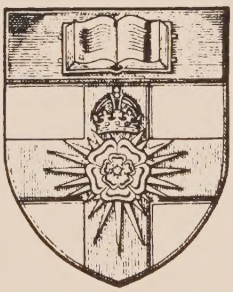
UNIVERSITY OF LONDON LIBRARY

THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

REFERENCE ONLY

346.4 Mx North



UNIVERSITY OF LONDON
LIBRARY

Digitized by the Internet Archive
in 2026

https://archive.org/details/law-reports-chancery-division_1919_2

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—H. F. Dickens, Esq., K.C.
Vice-Chairman——T. R. Hughes, Esq., K.C.

EX-OFFICIO MEMBERS.

Right Hon. Sir Gordon Hewart, M.P. . Attorney-General
Sir E. M. Pollock, M.P. . . . . Solicitor-General.
W. A. Sharpe, Esq., President of the Law Society.

ELECTED MEMBERS.

T. J. C. Tomlin, Esq., K.C. W. R. Sheldon, Esq.	Lincoln's Inn.
H. F. Dickens, Esq., K.C. Sir Hugh Fraser.	Inner Temple.
C. C. Scott, Esq., K.C. A. Macmorran, Esq., K.C.	Middle Temple.
Sir Lewis Coward, K.C. Edward Clayton, Esq., K.C.	Gray's Inn.
T. R. Hughes, Esq., K.C., of Lincoln's Inn. E. W. Hansell, Esq., of the Inner Temple.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
W. Melmoth Walters, Esq. (Firm—Messrs. Walters & Co.). J. W. Budd, Esq. (Firm—Messrs. Budd, Johnson & Jecks).	The Law Society.

Secretary—P. Noble Fawcett, Esq., 30, Montague Street, London, W.C. 1.

1919.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

Supreme Court of Judicature.

CASES DETERMINED IN THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

EDITOR—RIGHT HON. SIR FREDERICK POLLOCK, BART.,
Barrister-at-Law.

REPORTERS.

Court of Appeal	G. A. STREETEN, W. IVIMEY COOK,	*Barristers-at-Law.*
Mr. Justice Eve AND Mr. Justice Peterson	GEORGE MACAN, R. MORRISON,	*Barristers-at-Law.*
Mr. Justice Sargant AND Mr. Justice Younger	FRANK EVANS, ARTHUR LAWRENCE,	*Barristers-at-Law.*
Mr. Justice Astbury AND Mr. Justice P. O. Lawrence	G. R. ALSTON, H. L. FRASER,	*Barristers-at-Law.*
	A. CORDERY,	*Barrister-at-Law.*

1919.—VOL. II.

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,
AND
PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4.

BIBL. LONDIN UNIV.

Lord Birkenhead	*Lord Chancellor.*
Earl of Reading	*Lord Chief Justice of England.*
Sir C. Swinfen Eady (Lord Swinfen) Lord Sterndale	*Masters of the Rolls.*
Sir J. Eldon Bankes Sir T. Rolls Warrington Sir T. E. Scrutton Sir H. E. Duke Sir J. R. Atkin Sir R. Younger	*Lords Justices of the Court of Appeal.*
Lord Sterndale Sir H. E. Duke	*Presidents of the Probate, Divorce, and Admiralty Division.*
Sir H. T. Eve Sir C. H. Sargant Sir J. M. Astbury Sir R. Younger Sir A. F. Peterson Sir P. O. Lawrence Hon. F. Russell	*Justices of High Court attached to Chancery Division.*
Sir Gordon Hewart	*Attorney-General.*
Sir E. M. Pollock	*Solicitor-General.*

ERRATUM.

Page 294. In this case *P. F. Wheeler* was omitted as appearing for the trustees of the will of the 13th Viscount Mountgarret.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1919, will be as follows:—

In the First Series.
[1919] 1 Ch. [1919] 2 Ch.

In the Second Series,
[1919] 1 K. B. [1919] 2 K. B. [1919] P.

In the Third Series,
[1919] A. C.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Aktiengesellschaft für Autogene Aluminium Schweissung *v.* London Aluminium Co. – – –(C.A.)	67
Aluminium (London) Co., Aktiengesellschaft für Autogene Aluminium Schweissung *v.* – – –(C.A.)	67
Auerbach *v.* Nelson – –	383

B.

Barking Chemicals Co., Morrison *v.* – – – –	325
Blay (William F.), Ld., Croft *v.* – – – –(C.A.)	343
British Consolidated Oil Corporation, *In re.* Howell *v.* The Co. – – –	81
British Salicylates, Ld., *In re*–	155
Brown, Ives *v.* – – –	314
Burford & Co.'s Application, *In re* – – –(C.A.)	28
Butt & Co., Weston-super-Mare Urban Council *v.*(C.A.)	1

C.

Cain *v.* Cain. *In re* Cain's Settlement – –(C.A.)	364
Cain's Settlement, *In re.* Cain *v.* Cain – – –(C.A.)	364
Carter *v.* Hutchinson. *In re* Hutchinson – –(C.A.)	17
Castings (Patent) Syndicate *v.* Etherington– –(C.A.)	254
Champion *v.* Wallace. *In re* Wallace – – – –	305

PAGE

Chartered Institute of Patent Agents, Law *v.*– – – 276
Chemicals (Barking) Co., Morrison *v.* – – – – 325
Cope and Wadland's Contract, *In re* – – – – 376
Cope, Secretary of State for War *v.* – – – – 339
Croft *v.* Blay (William F.), Ld. – – –(C.A.) 343

D.

De Keyser's Royal Hotel, *In re.* De Keyser's Royal Hotel *v.* The King –(C.A.) 197
De Keyser's Royal Hotel *v.* The King. *In re* De Keyser's Royal Hotel –(C.A.) 197
Dugdale *v.* Zouche (Baroness). *In re* Zouche (Baroness) – 178

E.

Etherington, Patent Castings Syndicate *v.* – –(C.A.) 254

F.

Fraser and Chalmers, Ld., *In re* – – – – 114

G.

Gibbons, *In re.* Gibbons *v.* Gibbons – – – – 99
Gibbons *v.* Gibbons. *In re* Gibbons – – – – 99
Gray, Public Trustee *v. In re* Westerton – – – 104

H.

Hodgson's Trusts, *In re.* Public Trustee *v.* Milne– – 189
Hollebone, *In re.* Hollebone *v.* Hollebone – – – 93

PAGE

Hollebone *v.* Hollebone. *In re* Hollebone – – – 93
Howell *v.* British Consolidated Oil Corporation. *In re* The Co. – – – – 81
Hutchinson, *In re.* Carter *v.* Hutchinson –(C.A.) 17
Hutchinson, Carter *v. In re* Hutchinson – –(C.A.) 17
Hyde, Valentine *v.* – – 129

I.

Ingilby, Mountgarret *v. In re* Mountgarret – – – 294
Ives *v.* Brown – – – 314

J.

Jewell's Settlement, *In re.* Watts *v.* Public Trustee – 161

K.

Keighley, *In re.* Keighley *v.* Keighley – – – – 388
Keighley *v.* Keighley. *In re* Keighley – – – – 388

L.

Law *v.* Chartered Institute of Patent Agents – – – 276
London Aluminium Co., Aktiengesellschaft für Autogene Aluminium Schweissung *v.* – – –(C.A.) 67

M.

Milne, Public Trustee *v. In re* Hodgson's Trusts– – 189
Morrison *v.* Barking Chemicals Co. – – – – 325

PAGE

Mountgarret, *In re*. Mountgarret *v.* Ingilby – – 294
Mountgarret *v.* Ingilby. *In re* Mountgarret – – – 294

N.

Nelson, Auerbach *v.* – – 383

O.

Oil (British Consolidated) Corporation, *In re*. Howell *v.* The Co. – – – – 81

P.

Palmer, Wragg *v.* *In re* Wragg – – – – 58
Patent Castings Syndicate *v.* Etherington – –(C.A.) 254
Pattenden, Pole *v.* *In re* Richardson – – – 50
Pole *v.* Pattenden. *In re* Richardson – – – 50
Public Trustee *v.* Gray. *In re* Westerton – – – 104
Public Trustee *v.* Milne. *In re* Hodgson's Trusts – – 189
Public Trustee, Watts *v.* *In re* Jewell's Settlement – 161

R.

Rex, De Keyser's Royal Hotel *v.* *In re* De Keyser's Royal Hotel – – –(C.A.) 197
Richardson, *In re*. Pole *v.* Pattenden – – – 50

S.

PAGE

Salicylates (British), Ld., *In re* – – – – 155
Sawyer & Withall, *In re* – 333
Secretary of State for War *v.* Cope – – – – 339

V.

Valentine *v.* Hyde– – – 129

W.

Wadland and Cope's Contract, *In re* – – – – 376
Wallace, *In re*. Champion *v.* Wallace – – – – 305
Wallace, Champion *v.* *In re* Wallace – – – – 305
Watts *v.* Public Trustee. *In re* Jewell's Settlement– – 161
Westerton, *In re*. Public Trustee *v.* Gray– – – 104
Weston-super-Mare Urban Council *v.* Butt & Co.(C.A.) 1
Wragg, *In re*. Wragg *v.* Palmer – – – – 58
Wragg *v.* Palmer. *In re* Wragg – – – – 58

Z.

Zouche (Baroness), *In re*. Dugdale *v.* Zouche (Baroness) 178
Zouche (Baroness), Dugdale *v.* *In re* Zouche (Baroness) 178

TABLE OF CASES CITED.

A.

		PAGE
Abingdon Rural Council *v.* City of Oxford Electric Tramways	[1917] 2 K. B. 318	15
Abrahams, In re	[1908] 2 Ch. 69	168
Adams *v.* Barry	2 Coll. 285	54
Ailesbury (Marquis) and Iveagh (Lord), In re	[1893] 2 Ch. 345	379
Allen *v.* Flood	[1898] A. C. 1	135
Allinson *v.* General Council of Medical Education and Registration	[1894] 1 Q. B. 750	282
Allsop, In re	[1914] 1 Ch. 1	54
Ames, In re	[1893] 2 Ch. 479	102
Anglo-Canadian Lands (1912), In re	[1918] 2 Ch. 287	85
Ascherson *v.* Tredegar Dry Works and Wharf Co.	[1909] 2 Ch. 401	325
Ashton Gas Company *v.* Attorney-General	[1906] A. C. 10	258, 364
Attorney-General *v.* Ailesbury (Marquis)	12 App. Cas. 672	191
——— *v.* Albany Hotel Company	[1896] 2 Ch. 696	340
——— *v.* Ashton Gas Company	[1904] 2 Ch. 621; [1906] A. C. 10	258, 367
——— *v.* Brackenbury	1 H. & C. 782	390
——— *v.* Great Northern Railway Company	30 Times L. R. 557; [1916] 2 A. C. 356	5
——— *v.* Horner	14 Q. B. D. 245	202
——— *v.* Scott	[1905] 2 K. B. 160	5
——— *v.* Sharpness New Docks and Gloucester and Birmingham Navigation Company	[1913] 1 K. B. 422; [1914] 3 K. B. 1	5
——— *v.* Tomline	14 Ch. D. 58	215
Aveland (Lord) *v.* Lucas	5 C. P. D. 211	5
Avery's (W. & F.) Application, In re	36 Rep. Pat. Cas. 89	35

B.

Bankers' Case, The	14 How. St. Tr. 1; 5 Mod. 29; Skinner, 601	204, 241
Barnsley British Co-operative Society *v.* Worsborough Urban Council	[1916] 1 A. C. 291	5
Bateman *v.* Hunt	[1904] 2 K. B. 530	107
Beard, In re	[1908] 1 Ch. 383	310
Beaumont, In re	[1902] 1 Ch. 889	108
Beavan *v.* Beavan	24 Ch. D. 649 n.	93
Bective Estate, In re	27 L. R. Ir. 364	379

		PAGE
Beech *v.* Keep	18 Beav. 285	108
Benno Jaffé und Darmstaedter Lanolin Fabrik *v.* John Richardson & Co.	10 Rep. Pat. Cas. 136	68
Berna Commercial Motors, In re	[1915] 1 Ch. 414	34
Berrey *v.* Lindley	3 Man. & G. 498	345
Beverly, In re	[1901] 1 Ch. 681	60
Billericay Rural Council *v.* Poplar Union	[1911] 2 K. B. 801	5
Birch *v.* Cropper	14 App. Cas. 525	119
Bird *v.* Luckie	8 Hare, 301	25
Birtle's Settled Estates, In re	11 W. R. 739	379
Blow, In re	[1914] 1 Ch. 233	51
Bond's Estates, In re	48 Sol. J. 192	102
Boyd, In re	[1897] 2 Ch. 232	389
Boyer's Settled Estates, In re	[1916] 2 Ch. 404	102
Bradford Old Bank *v.* Sutcliffe	[1918] 2 K. B. 833	328
Braithwaite, In re	21 Ch. D. 121	60
Brandts, Sons & Co. *v.* Dunlop Rubber Company	[1904] 1 K. B. 387	108
Brice *v.* Bannister	3 Q. B. D. 569	108
British Cast Plate Manufacturers *v.* Meredith	4 T. R. 794	204
Bromley Rural Council *v.* Croydon Corporation	6 L. G. R. 165	5
Brooke *v.* Price	[1917] A. C. 115	364
——— (Lord) *v.* Warwick (Earl)	2 De G. & Sm. 425	182
Brooks, In re	76 L. T. 771	63
Brown, In re	29 Ch. D. 889	64
——— *v.* Price	27 L. J. (C. P.) 290	169
Brown's Estate, In re	[1893] 2 Ch. 300	328
Bruce, In re	[1908] 2 Ch. 682	168
Bulcock *v.* St. Anne's Master Builders' Federation	19 Times L. R. 27	135
Bullock *v.* Downes	9 H. L. C. 1	17
Burridge *v.* Rowe	1 Y. & C. Ch. 183	167
Burrough *v.* Philcox	5 My. & Cr. 72	389

C.

Cadbury Bros' Application, In re	[1915] 1 Ch. 331	34
Camden (Marquis) *v.* Batterbury	5 C. B. (N. S.) 808; 7 C. B. (N. S.) 864	227
Cannon Brewery Company *v.* Central Control Board (Liquor Traffic)	[1918] 2 Ch. 101	202
Cape Colony Commissioners *v.* Logan	[1903] A. C. 355	202
Caplin's Will, In re	2 Dr. & Sm. 527	389
Carne's Settled Estates, In re	[1899] 1 Ch. 324; 68 L. J. (Ch.) 120	99
Chamberlain *v.* Hutchinson	22 Beav. 444	390
Cheese *v.* Keen	[1908] 1 Ch. 245	52
Cherry *v.* Boultbee	4 My. & Cr. 442	168
Chesterfield's (Earl) Trusts, In re	24 Ch. D. 643	93
Chichester Corporation *v.* Foster	[1906] 1 K. B. 167	5
China Mutual Steam Navigation Company *v.* MacLay	[1918] 1 K. B. 33	213
Christian *v.* Devereux	12 Sim. 264	54
Churchward *v.* Ford	2 H. & N. 446	227
Clayton's Case	1 Mer. 572	189

		PAGE
Collins *v.* Sedgwick	[1917] 1 Ch. 179	254
Condran, In re	[1917] 1 Ch. 639	254
Connolly to Sheridan and Russell, Ex parte	[1900] 1 I. R. 1	333
Constable's Settled Estates, In re	[1919] 1 Ch. 178	376
Conway *v.* Wade	[1909] A. C. 506	134
Cooke's Settlement, In re	[1913] 2 Ch. 661	61
Coomber *v.* Berks Justices	9 App. Cas. 61	245
Cotterell *v.* Jones	11 C. B. 713	134
Coxen *v.* Rowland	[1894] 1 Ch. 406	389
Crace, In re	[1902] 1 Ch. 733	328
Craven, In re	[1914] 1 Ch. 358	61
Crawford (William) & Son's Application, In re	[1917] 1 Ch. 550	34
Crawley *v.* Crawley	7 Sim. 427	98
Crosfield & Sons, In re	[1910] 1 Ch. 130	34
Croyden, In re	55 Sol. J. 632	51
Curran *v.* Treleaven	[1891] 2 Q. B. 545	135

D.

Dacre, In re	[1916] 1 Ch. 344	177
Daimler Case	33 Rep. Pat. Cas. 337	37
Dallimore *v.* Williams	[1914] Current Digest, 683; 30 Times L. R. 432.	136
Dalrymple, In re	49 W. R. 627	102
Darcy *v.* Croft	9 Ir. Ch. Rep. 19	171
Davey, In re	[1915] 1 Ch. 837	308
Davies' Trusts, In re	L. R. 13 Eq. 163	389
Deakin, In re	[1894] 3 Ch. 565	389
Debenture Corporation *v.* Uttoxeter Brewery	Palmer's Company Precedents 10th ed., Part III., p. 737	85
Dick, In re	[1891] 1 Ch. 423	61
Dillon, In re	44 Ch. D. 76	107
Doe *v.* Dobell	1 Q. B. 806; 1 G. & D. 218	345
—— *v.* Grafton	18 Q. B. 496	348
—— *v.* Johnson	6 Esp. 10	346
—— *v.* Lawson	3 East, 278	20
—— *v.* Lines	11 Q. B. 402	346
—— *v.* Stapleton	3 C. & P. 275	348
—— *v.* Stenlake	12 East, 515	295
—— *v.* Watts	7 T. R. 83	346
—— *v.* Weller	7 T. R. 478	346
Dougal *v.* McCarthy	[1893] 1 Q. B. 736	347
Du Cane and Nettlefold's Contract, In re	[1898] 2 Ch. 96	376
Durham Brothers *v.* Robertson	[1898] 1 Q. B. 765	108

E.

Eastman's Settled Estates, In re	68 L. J. (Ch.) 122	102
Edgcomb *v.* Dee	Vaugh. 89	253
Edwards *v.* Jones	1 My. & Cr. 226	109
Edwards' Settlement, In re	[1897] 2 Ch. 412	102
Egerton *v.* Brownlow (Earl)	4 H. L. C. 1	305
Ellicombe *v.* Gompertz	3 My. & Cr. 127	299

		PAGE
Espuela Land and Cattle Company, In re	[1909] 2 Ch. 187	114
Everett *v.* Remington	[1892] 3 Ch. 148	320

F.

Fellows, Ld. *v.* Corker	[1918] 1 Ch. 9	254
Finch *v.* Hollingsworth	21 Beav. 112	389
Forbes *v.* Ball	3 Mer. 437	389
Formby *v.* Barker	[1903] 2 Ch. 539	315
Forsbrook *v.* Forsbrook	L. R. 3 Ch. 93	298
Forster, In re	Unreported	157
Fox, Ex parte	5 T. R. 276	243
Fraser *v.* Murdoch	6 App. Cas. 855	63

G.

Gaskell *v.* Lancashire and Cheshire Miners' Federation	[1912] Current Digest, 626; 28 Times L. R. 518	136
Geirionydd Rural Council *v.* Green	[1909] 2 K. B. 845	5
Gent & Eason's Contract, In re	[1905] 1 Ch. 386	61
Giblan *v.* National Amalgamated Labourers' Union	[1903] 2 K. B. 600	134
Gibson *v.* Lawson	[1891] 2 Q. B. 545	136
Glegg *v.* Bromley	[1912] 3 K. B. 474	108
Gorton Local Board *v.* Prison Commissioners	[1904] 2 K. B. 167 n.	246
Gourley *v.* Plimsoll	L. R. 8 C. P. 362	70
Gramophone Co.'s Application, In re	[1910] 2 Ch. 423	36
Grant *v.* Lynam	4 Russ. 292	388
Griffin, In re	[1899] 1 Ch. 408	108
Gundry *v.* Pinniger	1 D. M. & G. 502	25

H.

Hall *v.* Warren	9 H. L. C. 420	310
Hallett's Estate, In re	13 Ch. D. 696	191
Hambleton *v.* Brown	[1917] 2 K. B. 90	109
Hamilton, In re	[1895] 2 Ch. 370	390
Hamlin *v.* Great Northern Railway Company	26 L. J. (Ex.) 20	172
Hampton *v.* Holman	5 Ch. D. 183	298
Hancock *v.* Smith	41 Ch. D. 456	191
Harding *v.* Harding	17 Q. B. D. 442	108
Haseltine *v.* Haseltine	3 Madd. 276	184
Hawkins *v.* Coulthurst	5 B. & S. 343	173
Hazeldine, In re	[1918] 1 Ch. 433	60
Hazle's Settled Estates, In re	29 Ch. D. 78	102
Heasman *v.* Pearse	L. R. 7 Ch. 275	298
Hellier *v.* Silleox	19 L. J. (Q. B.) 295	227
Helsby, In re	84 L. J. (Ch.) 682	19
Hemsworth Rural Council *v.* Micklethwaite	2 L. G. R. 1084	5
Hill *v.* Clifford	[1907] 2 Ch. 236	283
—— *v.* Thomas	[1893] 2 Q. B. 333	2
Hilton *v.* Eckersley	6 E. & B. 47	139
Hobbs *v.* Wayet	36 Ch. D. 256	328
Hogan's Estate, In re	[1894] 1 I. R. 503	335

		PAGE
Hole *v.* Barlow	4 C. B. (N. S.) 334	205
Hollins & Co. *v.* Paget	[1917] 1 Ch. 187	254
Holloway *v.* Holloway	5 Ves. 399	20
Holmes, In re	25 W. R. 603	283
How *v.* Winterton (Earl)	[1896] 2 Ch. 626	53
Howarth *v.* Howarth	11 P. D. 68	169
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company	22 Ch. D. 561	328
Hugo *v.* Williams	L. R. 14 Eq. 224	295
Humberston *v.* Humberston	1 P. Wms. 332	299
Humble *v.* Bowman	47 L. J. (Ch.) 62	388
Humphreys *v.* Franks	18 C. B. 323	346
Hutchinson *v.* Smith	11 W. R. 417	181
Huttley *v.* Simmons	[1898] 1 Q. B. 181	135
Hyatt, In re	38 Ch. D. 609	54

I.

Ibbotson *v.* Elam	L. R. 1 Eq. 188	96
Ickeringill's Estate, In re	17 Ch. D. 151	390

J.

Jodrell, In re	44 Ch. D. 590	390
Johnson, In re	29 Ch. D. 964	53
——— *v.* Marriott	2 Cr. & M. 183	283
Johnston, In re	26 Ch. D. 538	182
——— *v.* Chestergate Hat Manufacturing Company	[1915] 2 Ch. 338	259
Jones *v.* Lock	L. R. 1 Ch. 25	109

K.

Kearney *v.* Lloyd	26 L. R. Ir. 268	134
Keates *v.* Lyon	L. R. 4 Ch. 218	320
Kelly *v.* Patterrson	L. R. 9 C. P. 681	346
Kemp *v.* Derrett	3 Camp. 510	351
Knill *v.* Prowse	33 W. R. 163	108

L.

Lacons *v.* Warmoll	[1907] 2 K. B. 350	51
Lacy, In re	[1899] 2 Ch. 149	56
Lambe *v.* Eames	L. R. 6 Ch. 597	388
Langham, In re	74 L. T. 611	167
Larkin *v.* Long	[1915] A. C. 814	134
Lea (R. J.), Ld.'s, Application, In re	[1913] 1 Ch. 446	34
Le Blanche *v.* London and North Western Railway Company	1 C. P. D. 286	169
Ledbury Rural Council *v.* Colwell Park Granite Quarries Company	108 L. T. 1002	16
——————— *v.* Somerset	84 L. J. (Q. B.) 1297	8
Ledgard *v.* Bull	11 App. Cas. 648	72
Leeson *v.* General Council of Medical Education and Registration	43 Ch. D. 366	282
Levi *v.* Lewis	6 C. B. (N. S.) 766; 9 C. B. (N. S.) 872	227
Lewis *v.* Davies	[1914] 2 K. B. 469	157

		PAGE
Lewis *v.* Nobbs	8 Ch. D. 591	64
Lipton, Ld. *v.* Ford	[1917] 2 K. B. 647	209
Llanover's (Baroness) Will, In re	[1903] 2 Ch. 16	102
Locke & Smith, In re	[1914] 1 Ch. 687	81
Lodge Sparking Plug Company's Application, In re	35 Rep. Pat. Cas. 222	35
Londesborough, In re	50 L. J. (Ch.) 9	182
London and North Western Railway Company *v.* Evans	[1893] 1 Ch. 16	202
Londonderry County Council *v.* MacCarthur	[1917] 2 I. R. 49	5
Long *v.* Millar	4 C. P. D. 450	384
Loveless, In re	[1918] 2 Ch. 1	367
Lumley *v.* Gye	2 E. & B. 216	140

M.

McEneaney *v.* Shevlin	[1912] 1 I. R. 32, 278	109
McFee, In re	79 L. J. (Ch.) 676	19
Machell *v.* Weeding	8 Sim. 4	302
Mackenzie, In re	[1899] 2 Q. B. 566	158
——— *v.* Iron Trades Employers' Insurance Association	1910 S. C. 79	134
Manton *v.* Tabois	30 Ch. D. 92	181
Marchant *v.* Morton, Down & Co.	[1901] 2 K. B. 829	109
Marsden, In re	26 Ch. D. 783	54
Martelli *v.* Holloway	L. R. 5 H. L. 532	299
Mathews *v.* Saurin	31 L. R. Ir. 181	328
Mecca, The	[1897] A. C. 286	191
Mellish, In re	[1916] 1 Ch. 562	19
Melton, In re	[1918] 1 Ch. 37	168
Miller *v.* Taylor	Tidd's Practice, 6th ed., p. 963; Tidd's Forms, 6th ed., p. 379	253
Milroy *v.* Lord	4 D. F. & J. 264	109
Mitford, Ex parte	1 Bro. C. C. 398	167
Mogul Steamship Company *v.* McGregor	23 Q. B. D. 598; [1892] A. C. 25	139, 143
Monypenny *v.* Dering	16 M. & W. 418; 2 D. M. & G. 145	298
Mordan, In re	[1905] 1 Ch. 515	61
Morgan *v.* Harrison	[1907] 2 Ch. 137	347
Morris *v.* Livie	1 Y. & C. Ch. 380	177
Mortimer, In re	[1905] 2 Ch. 502	299
——— *v.* Slater	7 Ch. D. 322	20
——— *v.* West	2 Sim. 274	298
Mortimore *v.* Mortimore	4 App. Cas. 448	17
Moss, In re	[1905] 2 K. B. 307	157
Mulcahy *v.* Reg.	L. R. 3 H. L. 306	142
Mundy and Roper's Contract, In re	[1899] 1 Ch. 275	376
Muratti's Case	32 Rep. Pat. Cas. 77	37

N.

National Assurance Association *v.* Best	2 H. & N. 605	169
National Cash Register Company's Application, In re	34 Rep. Pat. Cas. 354	38

		PAGE
National Phonograph Company *v.* Edison-Bell Consolidated Phonograph Company	[1908] 1 Ch. 335	135
National Telephone Company, In re.	[1914] 1 Ch. 755	114
Negus, In re	[1895] 1 Ch. 73	335
Nisbet *v.* Smith	2 Bro. C. C. 579	328

O.

Ogilvie *v.* Foljambe	3 Mer. 53	384
Ouseley *v.* Anstruther	10 Beav. 453	181

P.

Page, In re	[1893] 1 Ch. 304	53
Paget's Settled Estates, In re	30 Ch. D. 161	99
Pain, In re	[1919] 1 Ch. 38	167, 177
Palmer, In re	[1911] W. N. 171.	191
Parfitt *v.* Hember	L. R. 4 Eq. 443	298
Patent Type-Founding Company *v.* Richards	2 L. T. 359	72
Petition of Right, In re a	[1915] 3 K. B. 649	197
Piccadilly Hotel, In re	[1911] 2 Ch. 534	81
Pinédé's Settlement, In re	12 Ch. D. 667	389
Plant *v.* Bourne	[1897] 2 Ch. 281	283
Pocock and Prankerd's Contract, In re	[1896] 1 Ch. 302	378
Pope *v.* Whitcombe.	3 Mer. 689	389
Pope's Contract, In re	[1911] 2 Ch. 442	61
Port of London Authority *v.* Orsett Union Assessment Committee	[1919] 1 K. B. 84	262
Postmaster-General, Ex parte	10 Ch. D. 595	216
Pratt *v.* British Medical Association	[1919] 1 K. B. 244	134
Priddy *v.* Rose	3 Mer. 86	167
Prior *v.* Horniblow	2 Y. & C. Ex. 200	53
Pryce, In re	[1911] 2 Ch. 286	389

Q.

Quinn *v.* Leathem	[1901] A. C. 495	134

R.

Ranelaugh (Earl) *v.* Hayes	1 Vern. 189	328
Rayner, In re	[1904] 1 Ch. 176	61
——— *v.* Mowbray	3 Bro. C. C. 234	388
Rawlinson *v.* Rawlinson	3 Ch. D. 302; 24 W. R. 946.	182
Reg. *v.* Allan	4 B. & S. 915	282
—— *v.* Doutre	9 App. Cas. 745	227
—— *v.* Druitt	10 Cox C. C. 592	139
—— *v.* Gaisford	[1892] 1 Q. B. 381	282
—— *v.* Henley	[1892] 1 Q. B. 504	282
—— *v.* Lee	9 Q. B. D. 394	282
—— *v.* Meyer	1 Q. B. D. 173	282
—— *v.* Milledge	4 Q. B. D. 332	282
Registrar of Trade Marks *v.* W. & G. Du Cros	[1913] A. C. 624	34
Renals *v.* Cowlishaw	9 Ch. D. 125; 11 Ch. D. 866	314

		PAGE
Renard *v.* Levinstein	10 L. T. 94	72
Rex *v.* Halliday	[1917] A. C. 260	209
—— *v.* Hampden	3 How. St. Tr. 825	204
Rhodesia Goldfields, In re	[1910] 1 Ch. 239	168
Richardson, In re	[1904] 1 Ch. 332	298
Right *v.* Darby	1 T. R. 159.	347
Rising, In re	[1904] 1 Ch. 533	299
River Weir Commissioners *v.* Adamson	2 App. Cas. 743	151
Rochester (Dean and Chapter) *v.* Pierce	1 Camp. 466	227
Rodriguez *v.* Speyer Bros.	[1919] A. C. 59	138
Roe *v.* Ward	1 H. Bl. 97	346
Rogers *v.* Hosegood	[1900] 2 Ch. 388	314
Rossiter *v.* Miller	3 App. Cas. 1124	384
Rouse *v.* Bradford Banking Company	[1894] A. C. 586	328

S.

Saccharin Corporation *v.* Haines, Ward & Co.	15 Rep. Pat. Cas. 344	68
Salaman *v.* Warner	64 L. T. 598; 65 L. T. 132	134
Saltpetre Case.	12 Rep. 12	203
Santen *v.* Busnach	[1913] Current Digest, 648; 29 Times L. R. 214	135
Saunders *v.* Seyd and Kelly's Credit Index Company	75 L. T. 193	283
Seabrook, In re	[1911] 2 Ch. 286	389
Seaward *v.* Willock	5 East, 198	298
Secretary of State for War *v.* Chubb.	43 L. T. 83	339
Shaftesbury *v.* Shaftesbury	2 Vern. 747	184
Shardlow *v.* Cotterell	20 Ch. D. 90	383
Sharpness New Docks and Gloucester and Birmingham Navigation Company *v.* Attorney-General	[1915] A. C. 654	5
Sheffeild *v.* Ratcliffe	Hob. 334; Jenkins, 287	253
Sheffield Conservative and Unionist Club *v.* Brighten	85 L. J. (K. B.) 1669; [1916] W. N. 277	205
Shepton Mallet Rural Council *v.* Waine-wrights, Ld.	6 L. G. R. 1121	5
Ship Money Case	3 How. St. Tr. 825	206
Sidebotham *v.* Holland	[1895] 1 Q. B. 378	345
Sloper *v.* Saunders	29 L. J. (Ex.) 275	249
Smelting Corporation, In re	[1915] 1 Ch. 472	168
Smith, In re	[1896] 1 Ch. 71	61
——	[1899] 1 Ch. 331	102
—— *v.* Palmer	7 Hare, 225	25
—— *v.* Smith	1 Y. & C. Ex. 338	173
Snow *v.* Teed	L. R. 9 Eq. 622	389
South Wales Miners' Federation *v.* Glamorgan Coal Company	[1905] A. C. 239	135
South Western of Venezuela (Barquisimeto) Railway Company, In re.	[1902] 1 Ch. 701.	81
Spearman Settled Estates, In re	[1906] 2 Ch. 502	380
Stamford (Earl), In re	[1896] 1 Ch. 288	379
Stephens *v.* Venables (No. 1).	30 Beav. 625	167
—— *v* Barnet District Gas and Water Company	36 W. R. 924	335
Stevens *v.* Bishop	57 L. J. (Q. B.) 283	335

CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

WESTON-SUPER-MARE URBAN DISTRICT COUNCIL *v.* HENRY BUTT & COMPANY, LIMITED.

C. A. 1919

March 24, 25.

[1917 W. 358.]

Highway — Repairs — "Extraordinary traffic" — Expenses — Measure of Damages—Steam Wagons and Trailers—Standard of Repair—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

In August, 1913, the defendants, who were quarry owners in the neighbourhood of a residential town, commenced the haulage of limestone and goods along two roads in the plaintiffs' district by means of a steam wagon and trailer weighing, when loaded, 12 tons and 8 tons respectively. Before this date the defendants had used horse-drawn carts and wagons of a maximum weight of 3 tons. In January, 1916, a second steam wagon and trailer were used. The total weight drawn along one of the roads in question during the year ending March 31, 1913, was 13,524 tons, of which 12,108 tons passed over the other road. In the year ending March 31, 1914, when the first steam wagon and trailer were used there was a great increase in the volume and weight of the steam traffic, and in the year ending March 31, 1915, the total increased to 27,000 tons, of which 13,119 tons were carried by steam over both roads. The quarrying of stone, and the haulage thereof, and of lime had been local industries for many years in the plaintiffs' district, and quarry owners in recent years had almost universally substituted mechanical for horse traction. On a claim by the plaintiffs,

C. A.

1919

WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & Co.

under the Highways and Locomotives (Amendment) Act, 1878, in respect of extraordinary expenses, Eve J., applying the test whether at the time of the introduction by the defendants of their means of transporting this concentrated weight there was any existing traffic imposing a burden on the roads comparable with it in quality and frequency, held, on the evidence, that the steam wagon traffic on the roads was exceptional and "extraordinary" within the meaning of s. 23 of the Act and that the defendants were liable for the expenses incurred by the plaintiffs by reason of the damage arising from such traffic. On appeal:—

Held, that Eve J. had proceeded on a right principle and that the question being entirely one of fact, there was ample evidence to justify his decision, and that the Court would not interfere.

Hill v. *Thomas* [1893] 2 Q. B. 333 followed.

Decision of Eve J. [1919] 1 Ch. 11 affirmed.

APPEAL from a decision of Eve J. (1)

In this action the plaintiffs, as the highway authority for Weston-super-Mare, claimed from the defendants (1.) sums amounting in the aggregate to 1750*l*. for the extraordinary expenses incurred in repairing four roads within their district, namely, Arundel Road, Bristol Road, Upper Church Road and Park Place, such repairs being rendered necessary by the alleged extraordinary traffic of the defendants during the twelve months prior to the issue of the writ on February 21, 1917; (2.) damages suffered by reason of the wrongful and excessive user of Arundel Road and Bristol Road prior to February 21, 1916, and for damages prior to that date by reason of nuisances caused by the defendants.

The facts are fully stated in the report of the case in the Court below, and were shortly as follows: In August, 1913, the defendants, who were quarry owners in the neighbourhood of the town of Weston-super-Mare, commenced the haulage of limestone and goods along the roads by means of a steam wagon and trailer weighing, when loaded, 12 tons and 8 tons respectively. Before this date the defendants had used horse-drawn carts and wagons of a maximum weight of 3 tons. Damage to Arundel Road and Bristol Road became apparent, and in January, 1916, a second steam wagon and trailer were used. The total weight along the Bristol Road during the year ending March 31, 1913, was 13,524 tons, of which 12,108 tons passed over Arundel Road. In the year

(1) [1919] 1 Ch. 11.

ending March 31, 1914, when the first steam wagon and trailer were used, and when 25,645 tons were drawn over Bristol Road, of which 22,347 tons also passed along Arundel Road, 6838 tons were transported over both roads by steam traction. In the year ending March 31, 1915, the total increased to 27,096 tons, of which 13,119 tons were carried by steam over both roads. Damage was subsequently done to two other roads. The quarrying of stone, and the haulage thereof, and of lime had been local industries for many years in the plaintiffs' district, and quarry owners in recent years had almost universally substituted mechanical for horse traction.

The plaintiffs alleged that this "extraordinary traffic" damaged the roads by crushing and breaking up the surface, by making deep ruts, holes and corrugations, and by squeezing it out of shape, and in some of the roads by forcing some of the stones forming the foundations through the surface of the road, and that the roads thereby became a source of danger and a nuisance to the public.

On February 19, 1917, the plaintiffs' surveyor issued four certificates under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, from which it appeared that extraordinary expenses to the total amount above stated had been incurred in respect of the four roads.

The defence included a denial that the traffic was extraordinary, or that the plaintiffs had sustained the damage claimed; alternatively, that if such damage was sustained, it was caused by the failure of the plaintiffs to maintain the roads in a condition to withstand the ordinary traffic to be expected thereupon.

Eve J. held, on the evidence, and applying *Hill* v. *Thomas* (1), that the steam wagon traffic on the four roads was exceptional and "extraordinary" within the meaning of s. 23 of the Highways and Locomotives (Amendment) Act, 1878, but that total amount claimed for extraordinary expenses must be reduced to 280*l*., the sum claimed in respect of Arundel Road being wholly irrecoverable, not having been incurred within twelve months preceding the commencement of the action,

(1) [1893] 2 Q. B. 333.

C. A. 1919 — WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & CO.

according to s. 12 of the Locomotives Act, 1898. He further held that no case of public nuisance had been established.

The defendants appealed. The appeal was heard on March 24, 25, 1919.

The only question argued on the appeal was whether the traffic over the Bristol and Upper Church Road was "extraordinary" within the meaning of s. 23 of the Act of 1878. No question of amount was discussed.

W. A. Jowitt for the appellants. In determining that this is "extraordinary traffic" within the meaning of s. 23 of the Act of 1878, it is submitted that the learned judge in the Court below has proceeded on a wrong principle. He has relied only on the change of mode of conducting the traffic from horse-drawn or steam-drawn traffic. It is submitted that traffic must be considered to be ordinary if it is a mere reasonable extension of the ordinary traffic. A mere change in the mode in which traffic is conducted along a road does not make that traffic extraordinary traffic so long as (*a*) the new mode is in itself a proper mode; and (*b*) it is a mode which is being generally adopted, that is, throughout this country. Further, in determining whether traffic is or is not extraordinary it is quite immaterial to consider by whose order the traffic is conducted. The fact that all the traffic passing along a particular road is due to one person is immaterial. *Hill* v. *Thomas* (1) does not have regard to all the existing circumstances of the particular case. It makes its test only of what the road has borne in the past. That is not the correct test. The true test is what looking at the road a person would think it would bear.

[SWINFEN EADY M.R. What do you say is the meaning of "extraordinary traffic"?]

"Extraordinary traffic" is traffic above and beyond what could reasonably be anticipated and provided for on any given road. Here the use of steam wagons and trailers might have been anticipated, and the roads ought to have been brought up to a standard sufficient to bear their weight.

(1) [1893] 2 Q. B. 333.

[SWINFEN EADY M.R. Is there any case which supports your contention ?]

No ; but there are dicta. [He referred to *Billericay Rural Council* v. *Poplar Union* (1) ; *Lord Aveland* v. *Lucas* (2) ; *Wallington* v. *Hoskins* (3) ; *Hemsworth Rural Council* v. *Micklethwaite* (4) ; *Attorney-General* v. *Scott* (5) ; *Chichester Corporation* v. *Foster* (6) ; *Bromley Rural Council* v. *Croydon Corporation* (7) ; *Attorney-General* v. *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* (8) ; *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (9) ; *Attorney-General* v. *Great Northern Ry. Co.* (10) ; *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (11) ; *Londonderry County Council* v. *MacCarthur* (12) ; *Shepton Mallet Rural Council* v. *Wainewrights, Ld.* (13)]

[SCRUTTON L.J. referred to *Geirionydd Rural Council* v. *Green.* (14)]

Macmorran K.C. and *Joshua Scholefield* for the respondents were not called upon.

SWINFEN EADY M.R. In this case the defendants, Henry Butt & Co., Ltd., appeal from the judgment of Eve J., whereby he determined that the defendants were liable to pay in respect of a liability under s. 23 of the Highways and Locomotives (Amendment) Act, 1878. This section provides that " Where by a certificate of their surveyor it appears to the authority which is liable or has undertaken to repair any highway, whether a main road or not, that, having regard to the average expense of repairing highways in the neighbourhood, extraordinary expenses have been incurred by such authority in repairing such highway by reason of the damage caused

(1) [1911] 2 K. B. 801, 814.
(2) (1879) 5 C. P. D. 211, 221.
(3) (1880) 6 Q. B. D. 206.
(4) (1904) 2 L. G. R. 1084, 1089, 1092.
(5) [1905] 2 K. B. 160.
(6) [1906] 1 K. B. 167, 173.
(7) (1907) 6 L. G. R. 165.
(8) [1913] 1 K. B. 422, 441 ; [1914] 3 K. B. 1, 10, 19.
(9) [1915] A. C. 654.
(10) (1914) 30 Times L. R. 557, 558 ; on Appeal [1916] 2 A. C. 356, 366, 368.
(11) [1916] 1 A. C. 291.
(12) [1917] 2 I. R. 49, 50, 54.
(13) (1908) 6 L. G. R. 1121.
(14) [1909] 2 K. B. 845, 850.

C. A. 1919 — WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & Co. — Swinfen Eady M.R.

by excessive weight passing along the same, or extraordinary traffic thereon, such authority may recover in a summary manner from any person by whose order such weight or traffic has been conducted the amount of such expenses as may be proved to the satisfaction of the Court having cognizance of the case to have been incurred by such authority by reason of the damage arising from such weight or traffic as aforesaid." Then, still proceeding in a summary manner, the matter may be brought to the High Court. By a subsequent Act, the Locomotives Act, 1898, the right of action is limited to recovering damage done within the preceding twelve months; and so this action is brought by a writ issued on February 21, 1917, to recover the amount in respect of such expenses for the twelve months preceding that date.

The case for the plaintiffs is that the defendants have recently altered their manner of business by substituting tractors or steam wagons with trailers for horse-drawn vehicles in conducting their trade. They are quarry owners, quarrying limestone and burning it, and bringing down lime and limestone and ballast to the station, and also carting from the railway tons of coal. The plaintiffs have established that down to the month of August, 1913, the defendants used horse-drawn vehicles for all their trade, and that they brought all their goods down from the hills by horse-drawn vehicles for transportation. In the month of August, 1913, they first started to use a steam wagon with a trailer, and we are told that the weight of the wagon and trailer laden are together about 20 tons—that the weight of the steam wagon laden is about 12 tons, and that of the trailer about 8 tons, making the weight of the combined load 20 tons. Then at a later date, in part because of the shortage of labour, and in part because many of their horses had been requisitioned for national purposes, the defendants were constrained to add, for the purposes of their trade, a second steam wagon and trailer. The second steam wagon and trailer was started in or about January, 1916, and the year in respect of which this action is brought is from February 21, 1916—that is from the month following the installation of the second steam wagon and trailer—to

February 21, 1917. There had been a considerable and progressive increase of material drawn by steam. For the year ending March 31, 1914, I think the amount was something like 6838 tons; in the next year ending March 31, 1915, it rose to 13,000 tons odd, and in 1916 to 15,000 tons odd, and in the year that we are considering (it is really the year ending February 21, 1917, but for convenience it has been taken as ending on March 31, 1917), 17,220 tons. A census has been taken of the number of vehicles passing along the Bristol Road—that is one of the roads in respect of which the claim is brought—during twenty-three weeks beginning May 18 and ending October 23, 1916, the whole of that period was during the material year; and this census shows that during that period over 39,200 vehicles passed along the Bristol Road. Of that number 16,600 were ordinary bicycles. That left 22,600, and of those 14,782 were horse-drawn and 7818 mechanically propelled vehicles. Of the 7818 mechanically propelled vehicles 4358 were motor cycles, motors and taxis; in other words, light motor vehicles. That left 3460 vehicles for heavy motor or steam traffic; and out of this 3460 the defendants' wagons and trailers were 3213, showing that there were only 247 heavy motor vehicles on the Bristol Road belonging to persons other than the defendants, while during the same period the defendants had 3213 vehicles. Moreover the defendants' heavy motor or steam traffic did not begin before August, 1913, while in January, 1916, the number of their vehicles had been doubled.

I have given the figures with regard to the Bristol Road. There are only two roads in respect of which the defendants have been held liable; one is the Bristol Road and the other the Upper Church Road, and although the claim brought by the plaintiffs was very much reduced in amount by the learned judge, still the defendants have been found liable to a substantial amount. The question is whether, under the circumstances of this case, the defendants are liable in respect of the extraordinary expenses.

There is no doubt that it is the duty of the local authorities having the control of highways to keep the public highways

C. A. 1919 — WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & Co. — Swinfen Eady M.R.

in a state fit to accommodate the ordinary traffic which passes, or may be expected to pass, along them. The proposition was stated by Lord Atkinson in *Sharpness New Docks and Gloucester and Birmingham Navigation Co.* v. *Attorney-General* (1) in these terms: "My Lords, in the argument of this appeal many authorities were cited to establish that it is the duty of road authorities to keep their public highways in a state fit to accommodate the ordinary traffic which passes or may be expected to pass along them. As the ordinary traffic expands or changes in character, so must the nature of the maintenance and repair of the highway alter to suit the change. No person really contests that principle." In other words the public highways are to be kept in such a state of repair as is sufficient for what is the ordinary traffic from time to time. But in addition to what at any time may fall under the designation "ordinary traffic," there may also, at the same time, be traffic which is extraordinary, and in respect to such traffic the provisions of the statute of 1878 will apply.

What is "extraordinary traffic"? In one of the cases to which we were referred, *Ledbury Rural Council* v. *Somerset* (2), Buckley L.J., interpreting the words of Bowen L.J. in *Hill* v. *Thomas* (3), said that those words meant this: "The traffic must be extraordinary as regards the ordinary user of the road as a whole by all who use it." What is extraordinary traffic at one date may become in due time the ordinary traffic of a road, and it may cease to be extraordinary traffic: and in *Attorney-General* v. *Great Northern Ry. Co.* (4) Lord Buckmaster says that apart from traffic which may constitute a nuisance, "there may be unusually heavy traffic which, originally extraordinary traffic, upon a particular road becomes ordinary owing to the changed circumstances of the district through which the road runs"—that from time to time there will naturally be changes—and in considering what is extraordinary traffic, one has to consider the date

(1) [1915] A. C. 654, 665.
(2) (1915) 84 L. J. (Q. B.) 1297, 1305.
(3) [1893] 2 Q. B. 333.
(4) [1916] 2 A. C. 356, 366.

at which, and the road upon which, the traffic has passed.

In *Barnsley British Co-operative Society* v. *Worsborough Urban Council* (1), Lord Buckmaster said with regard to the facts of that case : " It is therefore quite plain that before the road was used under the circumstances that I have stated traffic of the description which was put upon it by the appellants would not have been the ordinary traffic of the road ; but this is essentially a question of fact, and a question of fact which I think must be determined at the time, and under all the circumstances existing, when the complaint was made. I do not think it is necessary in this case to consider how long the road may be the subject of extraordinary traffic before such extraordinary traffic becomes ordinary. What the learned judge who tried this case himself said with regard to that matter appears to me to be perfectly sound, namely, that extraordinary traffic is not the traffic which is due to the slow and normal increase of the development of traffic owing to the development of the district." And a little later on he said : " The question of ordinary and extraordinary traffic, above all questions, is a simple question of fact. The learned judge must determine, having regard to all the circumstances, what was the ordinary traffic of the road, and he must then settle whether or no the traffic complained of was not that ordinary traffic, but was extraordinary traffic which the road was not accustomed to bear. And then, of course, there comes the question whether the extraordinary traffic has caused damage. In determining those questions of fact it appears to me that the motive which influences the person who is charged with making an extraordinary use of the road, in using that road in preference to any other, can have no part at all."

The obligation being upon the local authorities to keep up the standard of their roads for the ordinary traffic of the district, it follows that traffic which is properly described at the time as extraordinary, occasioning additional expense to the local authority, is within and governed by the

(1) [1916] 1 A. C. 291, 299, 300.

C. A. 1919 — WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & CO. — Swinfen Eady M.R.

provisions of the statute of 1878. There certainly is no obligation upon the local authorities to maintain their roads at such a standard as that extraordinary traffic may pass along them without causing any damage for which the owners of the traffic will be liable.

The learned judge in this case has considered minutely the facts of the case, and has addressed himself, I think, to what is the proper test. He says: (1) "The proper test to apply is to ascertain whether at the time of the introduction of the means of transporting this concentrated weight there was any existing traffic imposing a burden on the road comparable with it in quantity or frequency." The circumstances which render the defendants liable in the present case are not only the total weight of the goods which they transport over the road, because if the same quantity had been transported in the old way by horse-drawn vehicles with practically small loads no claim for expenses could have arisen, but this is a case in which the mode of transport has been completely changed; the great bulk of the goods has been transported in loads of which the aggregate weight is some 20 tons, and the effect of that has been to cause a very considerable increase in the wear and tear of the roads by reason of this concentrated weight. It is not alleged that any of the vehicles were improperly constructed; it is quite conceded they were all proper vehicles to be put on the road, and that the traffic has been carried on in a proper manner; it is not suggested that what they have done is in any sense illegal or amounted to a nuisance. But what is suggested is that they have introduced a class of traffic on the roads in question which was not the ordinary traffic of the roads. The figures I have given show the very great difference there is between the ordinary traffic of the road and that additional concentrated burden which the defendants' operations have placed upon the road in question.

In my opinion the learned judge was right in coming to the conclusion that the plaintiffs had established a claim for these additional expenses on the two roads which are the

(1) [1919] 1 Ch. 19.

subject of this appeal, and that there was, under those circumstances, a liability upon the defendants to pay the additional amount.

I think nothing turns upon the actual figures. We have had no dispute about them. They have been very much reduced by the learned judge, and both sides seem to accept the figures as reduced, but notwithstanding the elaborate review of the authorities that Mr. Jowitt has made, I cannot bring myself to entertain any doubt that in this case the plaintiffs have established that the traffic brought upon the roads by the defendants is widely different in amount and character from the ordinary traffic of the road. It is extraordinary traffic with an excessive weight in respect to which the defendants have been properly found liable to pay the charges in question, and under these circumstances I am of opinion that the appeal fails.

WARRINGTON L.J. I am of the same opinion. The question we have to determine is whether the traffic conducted by the defendants upon two roads in the plaintiffs' district called respectively Bristol Road and Upper Church Road is extraordinary traffic, so as to render them liable under s. 23 of the Highways and Locomotives (Amendment) Act, 1878, to bear the extraordinary expenses incurred by the plaintiffs in consequence of damage caused by that extraordinary traffic.

It has been pointed out in the House of Lords in the *Barnsley Case* (1) by Lord Buckmaster, Lord Loreburn and Lord Parker that that question is one of fact to be determined by the judge before whom the case comes upon taking into account all the circumstances, including in particular the nature of the road along which the traffic has been taken; and it being a question of fact, that which has to be determined by the Court of Appeal is whether there was evidence upon which the learned judge could reasonably come to the conclusion at which he arrived. While those propositions are recognized by the appellants in the present case in general

(1) [1916] 1 A. C. 291.

C. A. 1919 — WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & CO. — Warrington L.J.

terms, they contend that the learned judge has approached the decision of the question of fact from the wrong point of view; in other words, that he has misdirected himself as to the question which he had to determine. Has the learned judge done that? He has relied in his judgment upon certain statements made in the judgment of the Court of Appeal delivered by Bowen L.J. in *Hill* v. *Thomas*. (1) It has however been pointed out by Lord Loreburn in the *Barnsley Case* (2), to which I have already referred, that Bowen L.J. in that judgment is not laying down an exhaustive definition of what is to be regarded as extraordinary traffic, but that he is really describing, "perhaps not exhaustively" —I am using the words of Lord Loreburn—"some classes of cases which may arise." That part of Bowen L.J.'s observations on which Eve J. in the present case relies is this: He says (3): "In *Hill* v. *Thomas* (4), according to the Court of Appeal, extraordinary traffic denotes"—and then comes a passage from the judgment of the Court of Appeal—"'a carriage of articles over the road, at either one or more times, which is so exceptional in the quality or quantity of articles carried, or in the mode or time of user of the road, as substantially to alter and increase the burden imposed by ordinary traffic on the road, and to cause damage and expense thereby beyond what is common.'" In my opinion it is not open to us in this Court to say that traffic which comes within the description thus expressed by Bowen L.J. is not extraordinary traffic. It may be that that describes, as Lord Loreburn says he thinks it does, only one class of extraordinary traffic, but if the traffic we have to deal with comes within that class, then it seems to me that we are bound to hold that that is extraordinary traffic. I am not suggesting for a moment that I am in the least inclined to disagree with what Bowen L.J. said. It seems to me that what he said was perfectly correct, if I may say so with all respect, but whether that is so or not I should be bound, I think, to accept that description as an accurate description, and to hold that traffic coming within it is extraordinary traffic.

(1) [1893] 2 Q. B. 333.
(2) [1916] 1 A. C. 291, 301.
(3) [1919] 1 Ch. 19.
(4) [1893] 2 Q. B. 333, 340.

The learned judge has taken the view that the traffic here does come within that description. I need not go through the facts in detail. What he says (1) about it is this, and I think I cannot do better than to express my agreement with it: "Where the frequent passage of concentrated weight is the element relied on as making the traffic extraordinary, the proper test to apply is to ascertain whether at the time of the introduction of the means of transporting this concentrated weight there was any existing traffic imposing a burden on the road comparable with it in quantity or frequency." It is that expression "concentrated weight" which seems to me with great accuracy to express just that quality in which the defendants' mode of user of the road differed from the previous mode of user of the road. When they introduced their two steam wagons and the trailers attached to them, it seems to me that they did proceed to use this road by conducting over it—I will not say excessive weight, because I should not think it is excessive at all—but concentrated weight, which made their mode of using the road different in essence from the mode of user which was the ordinary mode at the time they thus began to use it.

It seems to me that the learned judge has rightly held that what the defendants have done is within the description contained in the judgment of the Court of Appeal in *Hill* v. *Thomas* (2), and that there was ample evidence to support that finding, and for that reason we cannot interfere with it. In my opinion it is sufficient to say that. We have had an elaborate analysis of a number of authorities relating to the question of liability with regard to highways, or the burden with regard to highways imposed on the highway authorities, but in the view that I take of the facts of this case it is unnecessary to examine those cases in detail.

For these reasons I think the decision of the learned judge was correct.

SCRUTTON L.J. Mr. Jowitt has addressed to us an exhaustive and instructive argument on the subject of

(1) [1919] 1 Ch. 19. (2) [1893] 2 Q. B. 333.

C. A. 1919 WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & Co. Scrutton L.J.

extraordinary traffic. I hope I have been instructed suitably by the argument, but it appears to me to have been addressed to the wrong tribunal. In the House of Lords it may possibly have some chance of succeeding, but in this Court we are bound by the authorities already decided to hold that it is unfounded.

The Highways and Locomotives (Amendment) Act, 1878, provides that a person who orders, and therefore is responsible for, traffic on a road which is either excessive in weight, or extraordinary traffic, shall pay any damage caused by that traffic to be ascertained in a way provided by the statute. I do not think myself that in the discussion of what the words "extraordinary traffic" and "excessive weight" mean we have in the year 1919 got any further than Lindley J. did in 1879, the year after the Act was passed. He said in *Lord Aveland* v. *Lucas* (1): "The object of s. 23 is, to compel those who by unusual means cause unusual damage to the highway to pay the excess, and so relieve the ratepayers from an undue burden. We have first to ascertain what is meant by 'excessive weight' and 'extraordinary traffic.' It appears to me that those words must mean excessive and extraordinary with reference to the ordinary use and traffic upon and over the road." In 1915 Lord Buckmaster said in the *Barnsley Case* (2) "The learned judge must determine, having regard to all the circumstances, what was the ordinary traffic of the road, and he must then settle whether or no the traffic complained of was not that ordinary traffic, but was extraordinary traffic which the road was not accustomed to bear." I see no change in the proposition laid down by Lord Buckmaster in 1915 from that which was laid down by Lindley J. in 1879. But in 1893 there was a more detailed exposition of the meaning of the statute by Bowen L.J. in delivering the judgment of the Court of Appeal in *Hill* v. *Thomas*. (3) That judgment has been constantly followed by judges of first instance, including myself, and it has on several occasions been made the basis of judgments of this Court. In *Abingdon Rural Council* v. *City of Oxford Electric*

(1) 5 C. P. D. 211, 223. (2) [1916] 1 A. C. 291, 300.
(3) [1893] 2 Q. B. 333.

Tramways, Ltd. (1) the present Master of the Rolls begins his judgment by quoting it. In *Ledbury Rural Council* v. *Somerset* (2) Buckley L.J. begins his judgment by quoting it; and in my opinion it is not for this Court now to say that that judgment proceeded on a wrong basis. It is the standard which has been applied by the learned judge in deciding this case.

The features of this case seem to me to be two. There has been a complete change of method in carrying traffic, the change being in the direction of concentrating the weight of the traffic. Instead of horse carts carrying it, the cart and contents weighing about 3 tons, there have been steam tractors or lorries and trailers weighing about 20 tons. I agree that the weight carried is about the same over the year, but it has been concentrated and carried on fewer occasions, carried in larger individual items and carried by steam instead of by horses. That is the first feature. The second feature is, as is made clear by what was found by the learned judge, that the new method, the concentration of weight by steam tractors and trailers, was not, when it was introduced, an ordinary method of traffic on the road. The figures given by Eve J. show that apart from the appellants' lorries and trailers there was very little motor traffic on the road at all. If that is so, and one applies the standard laid down in *Hill* v. *Thomas* (3) and the other cases—Was this traffic out of the ordinary as regards the methods used on this road?—it appears to me there can be only one answer: namely, that this traffic was out of the ordinary as regards the methods used on that road.

Without going through the cases cited, it seems to me that I can illustrate the distinction very well by two cases, each relating to stone, the natural product of a district and each concerned with the change from horse traffic to heavy motor lorry traffic. In *Ledbury Rural Council* v. *Somerset* (4) the facts were that a change was made from horse traffic to motor traffic at a time when there was already a very large quantity of motor traffic on the road. Besides the amount of traffic introduced from Lady Henry Somerset's quarry there was

(1) [1917] 2 K. B. 318, 321.
(2) 84 L. J. (Q. B.) 1297, 1304.
(3) [1893] 2 Q. B. 333.
(4) 84 L. J. (Q. B.) 1297.

C. A. 1919 — WESTON-SUPER-MARE URBAN COUNCIL v. HENRY BUTT & CO. — Scrutton L.J.

already an equivalent amount, at least as much heavy traffic from other quarries in the neighbourhood on the road, and Lush J. and the Court of Appeal in effect said: "You have not shown that this was extraordinary traffic; a method has been adopted which is being used to an equal extent by other quarries in the neighbourhood using the same road. All that has been shown is that one person in the district is using an ordinary method of transit, used by other persons in the district over the road," and the claim for extraordinary expenses failed.

A case on the other side of the line is *Ledbury Rural Council* v. *Colwall Park Granite Quarries Co.* (1) There the facts were that a quarry company which had been carrying first by horse and then by light motor, partly on its own private road, suddenly started heavy traffic, a traction engine and two trucks, which ran repeatedly on a road on which there had previously been no heavy traffic at all. That traffic was held by the judge who decided the case to come within the definition in *Hill* v. *Thomas* (2) as to extraordinary traffic. The judge says (3), after citing *Hill* v. *Thomas* (2): "This definition has been repeatedly applied to cases where a natural product of the soil begins to be carried for mercantile purposes along a road on which, up to that time, it has not been carried, or by methods hitherto unused." Contrast those two cases, and you get an idea of the distinction which has been drawn in the cases.

The learned judge below has found that this case falls well within the principles which settle extraordinary traffic. It is a question of fact, and so far as I can see, there was ample evidence on which he could come to that conclusion.

Under these circumstances, I agree with the judgment proposed by the other members of the Court.

Appeal dismissed.

Solicitors: *Joynson-Hicks, Hunt, Cardew & McDonald; Mead, Steele & Co., for William Smith & Sons, Weston-super-Mare.*

(1) (1913) 108 L. T. 1002. (2) [1893] 2 Q. B. 333.
(3) 108 L. T. 1005.

W. I. C.

		PAGE
Stevenson *v.* Newnham	13 C. B. 285	138
Strong *v.* Bird	L. R. 18 Eq. 315	112
Studds *v.* Watson	28 Ch. D. 305	384
Sturge and Great Western Railway Company, In re	19 Ch. D. 444	19
Sweeney *v.* Coote	[1906] 1 I. R. 51, 109; [1907] A. C. 221	134
Sykes *v.* Howard	12 Ch. D. 826	68

T.

Talbot *v.* La Roche	15 C. B. 310	72
Temperton *v.* Russell	[1893] 1 Q. B. 715	141
Teofani & Co.'s Trade Mark, In re	[1913] 2 Ch. 545	28
Theys, Ex parte	25 Ch. D. 587	174
Thomas *v.* Hamlyn & Co.	[1917] 1 K. B. 527	254
——— *v.* The Queen	L. R. 10 Q. B. 31	228
Thurston, In re	32 Ch. D. 508	389
Tilghman's Patent Sand Blast Company *v.* Wright and Butler	1 Rep. Pat. Cas. 103	72
Timmis, In re	[1902] 1 Ch. 176	53
Tobin *v.* The Queen	16 C. B. (N. S.) 310	228
Tolhurst *v.* Associated Portland Cement Manufacturers	[1901] 2 K. B. 811	108
Torkington *v.* Magee	[1902] 2 K. B. 427; [1903] 1 K. B. 644	109
Towndrow, In re	[1911] 1 Ch. 662	177
Trimmer *v.* Danby	25 L. J. (Ch.) 424	108

U.

Usher's Wiltshire Brewery *v.* Bruce	[1915] A. C. 433	335

V.

Vacher & Sons *v.* London Society of Compositors	[1913] A. C. 107	136
Van Hagan, In re	16 Ch. D. 18	390
Vidal Dyes Syndicate *v.* Read, Holliday & Sons	28 Rep. Pat. Cas. 323	72

W.

Walker *v.* Bradford Old Bank	12 Q. B. D. 511	107
Wallington *v.* Hoskins	6 Q. B. D. 206	5
Webb *v.* Harle	L. R. 20 Eq. 556	123
Weekes' Settlement, In re	[1897] 1 Ch. 289	389
Weston, In re	[1900] 2 Ch. 164	167
Wharton *v.* Barker	4 K. & J. 483	20
Wheaton *v.* Maple & Co.	[1893] 3 Ch. 48	245
Wheeler, In re	[1904] 2 Ch. 66	168
Whittaker *v.* Kershaw	45 Ch. D. 320	328
Wigfull & Sons *v.* Jackson & Son	[1916] 1 Ch. 213	36
Wilkinson *v.* Duncan	23 Beav. 469	93
——— *v* Schneider	L. R. 9 Eq. 423	390

C. A. 1919

HUTCHINSON, *In re.* CARTER *v.* HUTCHINSON.

each and the accumulations (if any) thereon should fall into the residue of his personal estate. And the testator declared that subject to the trusts aforesaid his trustee should stand possessed of his said residue upon trust for his wife for life or during widowhood and after her decease or remarriage upon trust in equal shares for the benefit of his three daughters Elizabeth, Sarah and Frances and their respective children, and the testator directed that on failure of the trusts of the said third parts or shares, the part or share or parts or shares whereof the trusts should so fail with all accretions thereto should be added to the other or others equally of the said third parts or shares and be subject to the trusts thereinbefore declared concerning the part or share or respective parts or shares to which the same should attach. And the testator further declared that "on failure of all the trusts thereinbefore declared of the residue of his personal estate" such residue should be in trust "for such person or persons as on the failure of such trusts should be his next of kin and entitled to his personal estate under the statutes for the distribution of the personal estates of intestates, such persons if more than one to take distributively according to the said statutes."

The testator died on June 3, 1855, and his widow on August 24, 1870. He had four children only—namely, his three daughters and one son, who died in 1851 without ever having married.

Elizabeth Hutchinson died in 1898, without having had any issue.

Frances Hutchinson died in 1917, a spinster.

Sarah Hutchinson died in 1918, a spinster, having by her will dated in 1907 bequeathed the residue of her estate in trust for the defendants the National Refuges for Homeless and Destitute Children.

The question having arisen on the distribution of the testator's estate as to whether the next of kin who took as ultimate residuary legatees under his will ought in the events which had happened to be ascertained at the date of his death or at the date of the death of his last surviving daughter Sarah, a summons was taken out by the executors for the

determination of that question. Upon the hearing of that summons P. O. Lawrence J. held that the persons to take were the persons entitled under the Statutes of Distribution and to be ascertained as at the death of the testator.

The representatives of the persons who would have been the next of kin of the testator if he had died at the date of the death of his daughter Sarah appealed.

Preston (*Jenkins K.C.* with him) for the appellants. This is not a gift to "such persons as the law would prescribe in the event of my death intestate."

It is a gift to an artificial class of persons to be ascertained at a particular period—namely, "upon failure of the trusts."

P. O. Lawrence J. has held that everyone who claims must be entitled under the statute and therefore the class of next of kin must be ascertained at the death of the testator, and he relied upon *Bullock* v. *Downes*. (1)

But that case only establishes a prima facie rule which must yield to circumstances. This clause in the first place fixes the date at which the class is to be ascertained, and then provides that the persons who take must do so according to the statute.

The case is covered by *In re Sturge and Great Western Ry. Co.* (2), which has been followed many times and never overruled or disapproved.

[SWINFEN EADY M.R. The words there are "From the time of the decease of each respective child of mine."]

No doubt the language is somewhat stronger than in the present case, but the decision was followed in *In re McFee* (3) and *In re Helsby*. (4) The latter case cannot be reconciled with the judgment appealed against.

In *In re Mellish* (5) the gift, which contained the words "entitled under the Statutes of Distribution of intestates' estates," was held to be a gift to an artificial class consisting of the next of kin of a person to be ascertained as if he had died at a later date than that at which his death actually

(1) 9 H. L. C. 1.
(2) (1881) 19 Ch. D. 444.
(3) (1910) 79 L. J. (Ch.) 676.
(4) (1914) 84 L. J. (Ch.) 682.
(5) [1916] 1 Ch. 562.

C. A. 1919 HUTCHINSON, *In re.* CARTER *v.* HUTCHINSON.

occurred. I rely upon that decision. The law is summed up by Parker J. in *In re Winn* (1), though the decision itself is not applicable here. *Bullock* v. *Downes* (2) only establishes a prima facie rule which may be rebutted. There the testator fixed his own date for the ascertainment of that class: "In case I had died intestate," i.e., at the date of his death.

Mortimer v. *Slater* (3) is hardly distinguishable from *Bullock* v. *Downes*. (2) There Thesiger L.J. divides the authorities into three classes. 1. Where the word "then," the adverb of time, is attached to the description of the class; 2. Where words of futurity, but without the adverb of time, are attached to the description of the class; and 3. When the word "then" is used, not in connection with the description of the class, but in connection with the time at which the estate is to come into being.

[SWINFEN EADY M.R. Does not your case come within the second class?]

Perhaps. There are words of futurity no doubt, but they are words which define the date at which that class is to be ascertained. That case went to the House of Lords sub nom. *Mortimore* v. *Mortimore* (4), where it was treated as indistinguishable from *Bullock* v. *Downes*. (2) I submit that the present case comes within Lord Justice Thesiger's first class. It is true I have not got the word "then," but I have equivalent words.

In re Wilson (5) is distinguishable.

The words in this case involve the ascertaining of the class "on the failure of the trusts." The gift is referential, and there is no title under the statute. The words "entitled under the statutes" are not enough by themselves to alter the natural meaning of the earlier words.

[*Wharton* v. *Barker* (6), *Holloway* v. *Holloway* (7), and *Doe* v. *Lawson* (8) were also referred to.]

Coldridge K.C. and *Sheldon* for the respondents were not called upon.

(1) [1910] 1 Ch. 278, 289.
(2) 9 H. L. C. 1.
(3) (1877) 7 Ch. D. 322.
(4) 4 App. Cas. 448.
(5) [1907] 1 Ch. 450; [1907] 2 Ch. 572.
(6) (1858) 4 K. & J. 483.
(7) (1800) 5 Ves. 399.
(8) (1803) 3 East, 278.

Lavington for the trustees.

C. A. 1919 HUTCHINSON, *In re.* CARTER *v.* HUTCHINSON.

SWINFEN EADY M.R. I cannot bring myself to doubt that the conclusion of the learned judge in this case is in accordance with the reasonable and proper construction of the will. [The Master of the Rolls stated the facts, and continued:] It is in that state of things that the present question has arisen. All the three daughters are now dead, the survivor having died on January 11, 1918. They are all dead without children, and on the happening of that event the ultimate trust was to come into operation. The ultimate trust in the will is carried into effect by this clause: "And I do further direct that on failure of all the trusts hereinbefore declared of the residue of my personal estate such residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin and entitled to my personal estate under the statutes for the distribution of the personal estate of intestates such persons if more than one to take distributively according to the said statutes." So that in order to become entitled to participate in this residuary bequest a person must fulfil two conditions. He must be one of the next of kin, and must be one of the persons entitled to the testator's personal estate under the Statutes for Distribution. Reading the will apart from any authority at all, but endeavouring to arrive at the true construction of the words that are used without reference to any of the cases which have already been decided, one cannot fail to see that the gift "to my next of kin and entitled to my personal estate" must mean "the persons who would take according to law if I had died intestate."

The appellant seeks to read the will as if the bequest were to an artificial class, not to the persons really his next of kin or to the persons entitled to his personal estate upon his death if he died intestate. He seeks to extend it to a class who would have been the testator's next of kin if he had died on the day when the previous trusts failed—in other words to an artificial class. There is no doubt that by appropriate words in a will a gift may be made to

C. A. 1919

HUTCHINSON, *In re.* CARTER *v.* HUTCHINSON.

Swinfen Eady M.R.

such a class, and if the testator had in terms directed that it was to go to those persons who would have been his next of kin and entitled to his personal estate under the statute if he had lived until the failure of the trusts and died then, such a gift in law would have been quite valid; but that is not what this testator has said.

On the language of the will without any other assistance I should come clearly to the conclusion that the gift is to the testator's next of kin and persons entitled under the statute such persons to be determined as at the date of the testator's death. But the case does not rest there, because, having regard to the authorities it is quite clear that the Court is bound so to decide. *Bullock* v. *Downes* (1) in the House of Lords is the leading case. There the gift was: "In case," and so on—in the events that have happened, then the trustees "do and shall stand and be possessed of the said trust monies, etc., in trust for and to pay assign and transfer the same monies, etc., unto such person or persons of the blood or next of kin of me the said Andrew Downes as would by virtue of the Statutes of Distribution of Intestates' Effects, have become and been then entitled thereto in case I had died intestate."

Lord Cranworth, after pointing out that the general rule is that the death of the testator is the time to which the testator must be held to refer, pointed out that in that particular case the legatees who were to take on the son dying without issue were not the persons who would have been entitled if the testator had then died. That was not the language of the will, but those who would then have been entitled if the testator when he died had died intestate, and they would take as on an intestacy.

Subsequently to *Bullock* v. *Downes* (1) *Mortimer* v. *Slater* (2) was decided. There, the gift was, in the events that had happened "or if there be no such children, that the same be paid to such person or persons as will then be entitled to receive the same as my next of kin under the

(1) 9 H. L. C. 1. (2) 7 Ch. D. 322, 327, 330.

Statute for the Distribution of Intestates' Estates." Reversing the judgment of Bacon V.-C. the Court of Appeal held that the time to determine the persons to take was the death of the testator. James L.J. after reading the language of the will, put it in this way: "The words are, 'The same shall be paid to such persons as will then be entitled'; that is, to the persons to whom the law would give it. The expression does not denote the persons to whom the law under certain contingencies would give the title, but the persons who can allege themselves to be entitled under the statute. That was the ratio decidendi in *Bullock* v. *Downes*. (1) It appears to me to be plain that to satisfy that expression you must have a person who can show a title under the Statute of Distributions, and the only persons who can shew a title under the Statute of Distributions are the persons who were next of kin at the death of the testator (who was partially intestate) or the persons who represent them." Thesiger L.J. in the passage which has been read classified the cases to which attention has been drawn in three classes. Then he says: "Now, that being the state of the authorities, there can, as it seems to me, be no doubt that this case comes within the two latter classes of authorities, for we find that the word 'then' is not attached to the description of the class, but is most distinctly attached only to the words which import the time when the estate is to come into being, 'to such person or persons as will then be entitled to receive the same.'" That was affirmed by the House of Lords in *Mortimore* v. *Mortimore*. (2)

Another case which is closely analogous to the present is *In re Wilson*. (3) There the gift was: "If no child or other issue of his said nephew lived to attain a vested interest under the trusts thereinbefore contained, his trustees should hold the trust fund 'in trust for such person or persons as on the death of my said nephew Samuel Eyres Wilson will be entitled to'"—that is to share my estate, or, will be entitled to my estate—"as my next of kin under

(1) 9 H. L. C. 1. (2) 4 App. Cas. 448.
(3) [1907] 2 Ch. 572, 575.

C. A. 1919

HUTCHINSON, *In re.* CARTER *v.* HUTCHINSON.

Swinfen Eady M.R.

the Statute for the Distribution of Intestates' Estates." Observe the language there. It is, "such person or persons as on the death of my said nephew will be entitled." The language here is "on failure of the trusts the residue shall be in trust for such person or persons as on the failure of such trusts shall be my next of kin." One is "on the death of my said nephew," and the other is "on the failure of such trusts." The Court there took exactly the same view as was taken in *Mortimore* v. *Mortimore* (1) and as in *Bullock* v. *Downes*. (2) Farwell L.J. put it in this way: "The gift is, after the life interest, in trust for such person or persons as on the death of Samuel Eyres Wilson will be entitled thereto 'as my next of kin under the Statute for the Distribution of Intestates' Estates.' If you omit the words 'the death of my said nephew Samuel Eyres Wilson,' it is to my mind perfectly clear that the gift is to the next of kin under the Statute of Distributions who can only be ascertained at the death, as the statute provides, of the testator." It is quite manifest that if you were to omit the words "on the failure of such trusts" which is the corresponding event, it would simply be "to my next of kin entitled to my personal estate under the statute." The case would then be identical. Then he goes on to deal with the language: "If the words 'on the death of my said nephew' are read as equivalent to 'then,' which is possible, having regard to the antecedent life interest, then the case is clearly governed by the cases in the House of Lords, and it is plain that the clear gift to the next of kin, the persons to whom the statute gives it, is not cut down or affected by the use of the word 'then. Mr. Buckmaster was driven to argue that the insertion of the words 'on the death of my said nephew Samuel Eyres Wilson' cut down the clear gift which I find without those words, in favour of the persons to whom the statute gives it, that is to say, the only next of kin known to the law, and out of those words we are asked to elaborate a phrase, 'To such persons as would on the death of my nephew be entitled as my next of kin if I had died at the date of the death of my

(1) 4 App. Cas. 448. (2) 9 H. L. C. 1.

nephew.' I think it is absolutely impossible to cut down the clear words of the gift to the next of kin under the statute by converting the phrase 'on the death of my said nephew Samuel Eyres Wilson' into such an extraordinary sentence as Mr. Buckmaster's ingenious argument invites us to do." So here there is no authority whatever in the will for saying that this is a gift, not to the testator's next of kin, but to the persons who would have been the next of kin and entitled under the statute if he had died at some other date. I am of opinion that the case is clear and free from doubt, and the authorities to which I have referred, which are decisions either of this Court or of the House of Lords constrain this Court to arrive at the conclusion that the learned judge below was right, although as I have said even without those authorities I should come to the same conclusion. In my opinion the appeal fails.

SCRUTTON L.J. The point under discussion has been whether where the next of kin of a person are mentioned, it means his next of kin at the time when he actually died, or his next of kin at a time when he did not die, but is assumed, for the purposes of his will, to have intended that he should die. On this interesting question Lord Hatherley, in 1858, looked at forty cases which up to that time the industry of solicitors had raised on this point. Since that time we have been referred to at least a dozen cases more, in which again the lawyers who draft wills for testators have contrived to use language which has left in more or less obscurity what the testator meant on the subject. I have looked at, and am struck by, three passages in the judgment in a case which, curiously enough, has not yet been referred to, but which is I believe, sometimes said to have been the precursor of *Bullock* v. *Downes*. (1) That is *Gundry* v. *Pinniger*. (2) Lord Cranworth in giving the judgment of himself and Knight Bruce L.J. says: "It is, as pointed out by Vice-Chancellor Wigram in *Smith* v. *Palmer* (3), and also by my learned brother in *Bird* v. *Luckie* (4), exceedingly difficult, perhaps impossible,

(1) 9 H. L. C. 1.
(2) (1852) 1 D. M. & G. 502, 505.
(3) (1849) 7 Hare, 225.
(4) (1850) 8 Hare, 301.

C. A. 1919

HUTCHINSON, *In re.* CARTER *v.* HUTCHINSON.

Scrutton L.J.

to reconcile all the cases on the subject." I entirely agree. "The view which I take of the case is this, that whatever difficulty there may be in reconciling the cases on questions of this sort, or cases on analogous subjects, the great cardinal rule is that which is pointed out by Mr. Justice Burton, viz., to adhere as closely as possible to the literal meaning of the words. When once you depart from that canon of construction, you are launched into a sea of difficulties which it is difficult to fathom. Now is there anything on the face of this codicil making it inconsistent with the adoption of the ordinary meaning of the words, or leading to a manifest absurdity if that meaning be adopted? I see nothing of the sort. In the course of the argument I speculated on a variety of contingencies, which might be supposed to happen, and upon which, if you could ask the testatrix in her grave what she meant should take place under the circumstances, her answer would probably be that she did not contemplate them, but might well say that if she had, what she wished was that which the literal meaning of the words conveyed." Thirdly he says: "The meaning of the 'next of kin,' is next of kin at the death of the person whose next of kin is spoken of."

Those three passages are amply supported by the recent authorities. The two decisions in the House of Lords and the two decisions in the Court of Appeal seem to me to establish that when you talk of next of kin prima facie you talk of next of kin of the man at the time when he died. You may by the use of appropriate language speak not of that natural class which in fact existed, but of an artificial class which would have existed if he died at some other time. But you must use clear language if you wish to set up the artificial class and not the natural class. I think further the cases show that in the opinion of the judges who had decided them, if you speak of next of kin as being persons entitled by virtue of the statute, in view of the decisions you practically settle conclusively the question that you are speaking of the natural class to whom the Statute of Distributions applies, and not of the artificial class to whom it does not, except by a stretch of supposition, apply.

If the draftsman of a will wishes to set up an artificial class he has clear instructions how to do it. Let him say that the next of kin are to be treated as next of kin of the testator as if he had died at the time when it is desired to set up the artificial class, and let him avoid the words which have been found so conclusive by the judges who have decided these cases, "shall be entitled as my next of kin by virtue of the Statute of Distributions." For these reasons I entirely agree with the judgment which has been given by the Master of the Rolls.

EVE J. I have also come to the conclusion that the judgment pronounced by the Court below was correct. I think as a matter of construction that the expression "on the failure of such trusts" where it occurs the second time is equivalent to the word "thereupon" on which construction the subsequent reference to the Statute of Distributions becomes less material. But even if the true construction of the expression as it is used the second time be that it is equivalent to the word "then," in that case I think we are bound by the authorities to which reference has been made in the judgment of the Master of the Rolls, and it follows that in this case we can find no class other than the class of the next of kin existing at the time when the testator did in fact die.

Appeal dismissed.

Solicitors: *Rose, Johnson & Hicks; Hawes, Wood & Ware; Farrar, Porter & Co.*

G. A. S.

C. A. 1919 March 4, 5, 14.

In re H. G. BURFORD & CO., LIMITED'S, APPLICATION.

Trade Mark—Registration—Special Application—Distinctive Word—Surname of Manufacturer—"Adapted to distinguish"—User—Trade Marks Act, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *para.* 5; *s.* 44.

H. G. Burford & Co., Ld., were an English company incorporated in 1915, and occupied since then in the sale in this country of commercial motor vehicles manufactured in the United States of America. In February, 1918, they made a special application to the Board of Trade under s. 9, para. 5, of the Trade Marks Act, 1905, for the registration of the word "Burford" in script type in class 22 in respect of commercial motor vehicles, the word "Burford" being both a surname and a geographical name.

The Board of Trade referred the matter to the Court. The word "Burford" had been selected and used by the applicants as being the surname of the founder of the business in the United States, who was also largely interested in the company. The applicants adduced evidence to prove that the word "Burford" when used in connection with commercial motor vehicles, denoted vehicles of their manufacture. The user of the name had extended over about three and a half years, during which time between 400 and 500 of such vehicles had been sold in this country:—

Held, on the evidence (Scrutton L.J. dissenting), that the name "Burford" was distinctive in the United Kingdom of the applicants' commercial motor vehicles, not only to persons connected with the motor trade, but also to buyers and users of, and to persons interested in, such vehicles.

Held, also, that having regard to the applicants' business and to the rapid growth of their trade, the high reputation which their goods had already acquired, and the wide area over which that reputation extended, the fact that the user of the name had only extended over the short period of three and a half years was not a sufficient ground for refusing registration.

Held, further, that length of user was important only in considering the question of fact whether a name mark had become distinctive of the applicant's goods.

Held, therefore, that the application to register ought to be directed to proceed.

Scrutton L.J. *held* that the user of the mark had been for too short a period to confer sufficient distinctiveness on the mark to enable the application to succeed.

Dictum of Kennedy L.J. in *In re Teofani & Co.'s Trade Mark* [1913] 2 Ch. 545, 569 that an application for the admittance of a surname to registration ought to be most carefully scrutinized, and the acceptance of it obtained only where its distinctive character is quite clearly proved, and that it is no argument against this view that a certain degree of protection is given to other persons having the same name by s. 44 of the Act of 1905, approved by Swinfen Eady M.R.

Decision of Sargant J. reversed.

C. A.
1919
H. G. BURFORD & CO.'S APPLICATION, *In re.*

APPEAL from a decision of Sargant J.

On February 21, 1918, the applicants, H. G. Burford & Co., Ld., made a special application under s. 9, para. 5, of the Trade Marks Act, 1905 (1), for the registration of a mark consisting of the word "Burford" in script type in class 22 in respect of commercial motor vehicles.

The Board of Trade referred the matter to the Court.

On November 1, 1918, the applicants moved before Sargant J. for an order directing the Registrar of Trade Marks to proceed with their application for registration.

The following statement of facts is taken from the written judgment of Swinfen Eady M.R.: "The applicants are a company registered in 1915, and occupied since then in the sale in this country of commercial motor vehicles. Owing to the war the cars, or the parts, have hitherto been manufactured for the applicants in the United States, but they are now starting works for manufacturing in this country.

"Since the company was formed it has proceeded in a very

(1) The Trade Marks Act, 1905, provides:

Sect. 9: "A registrable trade mark must contain or consist of at least one of the following particulars:

(1.) The name of a company, individual, or firm represented in a special or particular manner;

(2.) The signature of the applicant for registration or some predecessor in his business;

(3.) An invented word or invented words;

(4.) A word or words having no direct reference to the character or quality of the goods, and not being according to its ordinary signification a geographical name or a surname;

(5.) Any other distinctive mark, but a name, signature, or word or words, other than such as fall within the descriptions in the above paragraphs (1.), (2.), (3.) and (4.), shall not, except by order of the Board of Trade or the Court, be deemed a descriptive mark:

. . . . . .

For the purposes of this section 'distinctive' shall mean adapted to distinguish the goods of the proprietor of the trade mark from those of other persons.

In determining whether a trade mark is so adapted, the tribunal may, in the case of a trade mark in actual use, take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered."

Sect. 44: "No registration under this Act shall interfere with any bona fide use by a person of his own name or place of business or that of any of his predecessors in business, or the use by any person of any bona fide description of the character or quality of his goods."

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

short time to build up a large business, the sales being about 70,000*l.* per annum, or 210,000*l.* in the three years, for complete vehicles. In addition, spare "Burford" parts have been sold to a value exceeding 30,000*l.* This is a great result, having regard to the difficulties of trading during the war, and, of course, to the shortness of the time. Every vehicle sold by the applicants, from the very first, has had the word 'Burford' placed conspicuously upon it as a trade mark. The cars have been extensively advertised, and in trade catalogues, advertisements, and commercial stationery, the word 'Burford' has appeared prominently as the company's trade mark. About 3000*l.* has already been spent in advertising the applicants' vehicles on these lines.

"There is considerable evidence from the North, South, East, and West of England that, among commercial companies, firms, and individuals, who are users of motor vehicles for the purposes of their trade—that is to say, from the public who use such vehicles—the applicants' vehicles are extensively known as, and only as, 'Burford' vehicles, and are extensively ordered as such—the orders being produced to verify this statement. That they are ordered by the public as 'Burford' admits of no doubt.

"It is also shown that it is the common practice in the motor car industry for manufacturers to distinguish the vehicles built by them by some trade mark, which is frequently, and indeed usually (though not universally), the surname of the manufacturer, such as 'Napier,' 'Crossley,' 'Daimler,' 'Peugeot,' 'Humber,' 'Austin,' 'Talbot,' 'Rolls-Royce,' and others. All these names, with others, are at present on the Register as trade marks, in class 22. Some have been registered by direction of the Board of Trade allowing the application to proceed. The 'Daimler' was registered by an order of the High Court directing the application to proceed—the Board of Trade having referred the matter to the Court. The evidence is that these word marks so registered have never been found to interfere with any legitimate use of his own name by anyone else. Indeed with so many instances of name marks in the motor industry, and the preference shown

by manufacturers in that trade for such name marks, it would appear that such marks more readily become distinctive of the goods of particular manufacturers than would prima facie be supposed.

" In addition to the evidence of business people, using motor vehicles for their trade, there is evidence from various motor car manufacturers, some competitors in trade with the applicants, who have known the applicants' trade mark 'Burford' almost from the time when the company was registered, who state that the mark has become absolutely identified with the applicants' vehicles, and is accepted by everyone as a guarantee that the vehicle is the applicants'; and that when that identification has been brought about, it is essential, not only for the protection of the manufacturer, but even more for the protection of the public, who rely upon the name being only properly used, that the name should be registered as a trade mark, and safeguarded in every possible way. As an instance of this class of evidence I may mention the affidavit of Mr. W. M. Letts, a director of Crossley Bros., Ltd. (who own the registered trade mark 'Crossley'), who states that he is not interested in the applicant company, who in fact carry on business in competition with Crossley Bros., Ld., and only supports the application because he considers that the applicants are fairly and justly entitled to the registration they claim, and because he is convinced that the interest of the public requires it. The evidence to the like effect of various motor car manufacturers comes from widely different parts of England.

" There is also the evidence of Mr. Albert Brown the president, and Mr. Thomas Woodfine the secretary, of the Society of Motor Car Manufacturers and Traders, Ld., both of whom have a very extensive knowledge of the trade, and of the distinguishing marks of the various different manufacturers, and know well the 'Burford' car in the same way as a 'Daimler,' or a 'Crossley,' or the like, Mr. Brown adding that, although the applicants came into the trade later than a number of other firms, their commercial motor vehicles have rapidly come to the front, and have acquired

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

a high reputation under the name and trade mark 'Burford.'"

Sargant J. held that it had been established by the evidence before him at the present time, amongst persons connected with the motor trade throughout the United Kingdom, the word "Burford"—when used in connection with commercial motor vehicles—denoted the commercial motor vehicles sold by the applicants, and was therefore distinctive in the ordinary sense; but that the surname of "Burford," though not a particularly common one, was not exceptionally rare; and that, having regard to all the circumstances of the case, the application to proceed ought to be refused.

The applicants appealed.

Kerly K.C. and *Sebastian* for the applicants. It is submitted that the applicants have established a prima facie case for allowing the registration of their mark to proceed. They have to prove to the satisfaction of the Court that the name "Burford" has become distinctive, that is, adapted to distinguish their goods from those of other persons within s. 9, para. 5, of the Act of 1905. This it is submitted they have done. The argument for the applicants may be summed up in the following propositions:

1. A surname may be "any other distinctive mark" within s. 9, para. 5.

2. The fact that a surname is more or less common only requires more or less complete association between the goods in question and the business of the applicant in the minds of the persons to be considered.

3. The persons to be considered are the users and buyers and the prospective users and buyers of the goods in question in the United Kingdom.

4. Distinctiveness in fact, if proved for the whole of the persons to be considered and for the whole of the United Kingdom, is sufficient to justify the acceptance of any surname, unless there is some objection other than it is common.

These propositions are, it is submitted, in accordance with the Act, and are not in conflict with any of the authorities.

There is no distinction between the use of a surname and that of any other word as a trade mark. No one except a person bearing the same surname can rightly wish to use it and no one other than that person is interested in opposing its registration. It is to the interest of every other person that the name should be registered. In the present case the probability of another person of the name of "Burford" coming into the motor business is practically non-existent. If the applicants' mark is registered they will be able to stop another "Burford" from improperly using the name more easily than by bringing a passing off action. Registration in this country enables the owner of the trade mark to prove reputed connection without calling evidence and acts as a warning to persons proposing to use the same name. It is also a condition precedent to registration in a foreign country.

The rarity of a name is no doubt a factor to be taken into account. In *In re Teofani & Co.'s Trade Mark* (1) the Court of Appeal appears to have thought that it is more easy to give distinctiveness where the name is an uncommon one. The real trouble comes not with common but uncommon names. No objection was taken in this case that "Burford" was also a geographical name. No doubt "Burford" is not as uncommon as "Teofani," but it is somewhat uncommon.

[SWINFEN EADY M.R. What is the commercial advantage of having merely the surname of the maker?]

If you have a name mark the most obvious is part of the name of the firm. There is a general objection amongst traders to compound names. They lead to confusion. In the present case the applicants come after the mark has been used, and the question the Court has to determine is whether it has in fact become distinctive. The mark has been tried and is found on the evidence to have become distinctive.

Sect. 44 was deliberately inserted in the Act as a corollary to s. 9, para. 5, in order to give a person protection in the honest use of his own name. The applicants are not asking for a monopoly in the name except so far as it is limited by that

(1) [1913] 2 Ch. 545.

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

section. The Legislature has taken more care with regard to surnames than other words.

[Scrutton L.J. I see great difficulty in allowing the registration of any surnames.]

In *Teofani's Case* (1) a surname was allowed to be registered as a trade mark.

The leading case on the subject is *In re Joseph Crosfield and Sons, Ltd.* (2)

[Swinfen Eady M.R. That was a different class of case. The word there was a descriptive word.]

The observations of Fletcher Moulton L.J. in that case on the right interpretation of the statute support the applicants' contention. See also *In re R. J. Lea, Ltd.'s Application.* (3) In *Registrar of Trade Marks* v. *W. & G. Du Cros, Ltd.* (4), where the Court refused the registration of the mark "W. & G.," a material fact to be considered is that there was there no evidence that "W. & G." in scroll form had become distinctive outside the London area. Lord Parker dealt with the mark as one that was proposed to be used and not as one which had already become distinctive. If the proper inference from the evidence is that at the moment of the application the mark is distinctive the length of user and the means by which that distinctiveness has been obtained are immaterial. *In re Cadbury Bros.' Application* (5) is a strong case in the applicants' favour. There the applicants, who had obtained the registration of the word "Cadbury" as their trade mark for cocoa and chocolate, applied to register the name for general confectionery in respect of which it was not proved that they had used the word as a trade mark, and the registration was allowed by Neville J. In *In re Berna Commercial Motors, Ltd.* (6) Sargant J. was satisfied with the user for five years of the word "Berna." In *In re William Crawford & Sons' Application* (7) there was a lack of evidence that the public were led to believe that "Crawford" biscuits were the goods of the applicants, and Neville J. held that the name had not been used for any

(1) [1913] 2 Ch. 545.
(2) [1910] 1 Ch. 130.
(3) [1913] 1 Ch. 446.
(4) [1913] A. C. 624.
(5) [1915] 1 Ch. 331.
(6) [1915] 1 Ch. 414.
(7) [1917] 1 Ch. 550, 556.

considerable time prior to the application and refused leave to proceed to registration. He also there expressed the view that *Cadbury's Case* (1) had gone the extreme length of the allowance of the registration of a surname as a trade mark. It is submitted, however, that those two decisions of Neville J. are quite reconcilable with one another. In *In re Lodge Sparking Plug Co.'s Application* (2) Neville J. directed the Registrar to proceed with the registration of the surname "Lodge," and in *In re W. and T. Avery's Application* (3) Younger J. allowed the registration of the name "Avery." Those complete the authorities on the point.

[They also referred to Kerly on Trade Marks, 4th ed., p. 903, for a list of words which had on special applications under s. 9, para. 5, been allowed by the Board of Trade or the Court to proceed to advertisement.]

G. T. Simonds (*Austen-Cartmell* with him) for the Registrar of Trade Marks. The word "distinctive" if it stood alone might denote merely present distinctiveness. But s. 9 shows that something more is necessary. The mark must be "adapted to distinguish." See the observations of Lord Parker in the House of Lords in *Registrar of Trade Marks* v. *W. & G. Du Cros, Ltd.* (4), which are as applicable to the registration of a surname as to the registration of a combination of letters. The words "adapted to distinguish" look to future possibilities as well as to present facts. The duty of the Court is to look to the future to see whether the words are adapted to distinguish. In doing so the Court may take into consideration the extent to which the user has in fact made the mark distinctive.

Before the Act of 1905 a surname was not registrable. Under that Act a surname became registrable subject to the restriction that it was distinctive; that is, adapted to distinguish. Distinctiveness, in fact, is not conclusive of registrability. The Court must look to potential distinctiveness. It must have regard to the possibility

(1) [1915] 1 Ch. 331.
(2) (1918) 35 Rep. Pat. Cas. 222, 225.
(3) (1919) 36 Rep. Pat. Cas. 89.
(4) [1913] A. C. 624, 636.

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

of persons of the same name as the applicant for registration wishing in the future to trade in the same class of goods.

Sect. 44 is not to be taken into consideration in determining whether a mark is distinctive. That section throws upon a person using a surname registered as a trade mark by some other person the onus of showing that he is using it in good faith. But where a surname has not been registered the remedy would be a passing off action and the onus would be on the plaintiff to show that the person of whom he complains was making an improper use of his own name.

There is an element of confusion where a person desires to use his own name in connection with his own business, and the onus ought not to be on him to show that he is acting in good faith: *In re Gramophone Co.'s Application* (1); *In re R. J. Lea Ltd.'s Application.* (2)

An application for admittance of a surname to registration ought to be most closely scrutinized, and the acceptance of it obtained only where its distinctive character is quite clearly proved, and it is no argument against this view that a certain degree of protection is given to other persons having the same surname by s. 44 of the Act. See per Kennedy L.J. in *In re Teofani & Co.'s Trade Mark.* (3)

On these authorities it is submitted that the question of distinctiveness must be determined without reference to s. 44. The Court in exercising its discretion must come to the decision whether the name is distinctive without reference to any provision for the protection of the individual in any other section. The test adopted by the Court is the degree of probability of persons of the same name desiring to make the same class of goods.

[Swinfen Eady M.R. referred to *J. Wigfull & Sons, Ltd.* v. *J. Jackson & Son, Ltd.* (4)]

There is no reason why a trader should use one descriptive word rather than another; but there is every reason why he should use his own name in connection with his own goods.

(1) [1910] 2 Ch. 423.
(2) [1913] 1 Ch. 446.
(3) [1913] 2 Ch. 545, 569.
(4) [1916] 1 Ch. 213.

The case is no stronger where the trade is one in which only a few persons are likely to be engaged, except that that may be a factor in diminishing the probability of persons of the same name engaging in that trade. The degree of commonness of the name is the decisive test: *In re Teofani and Co.'s Trade Mark.* (1) No other principle for the exercise of the discretion can be extracted from the decisions of the Courts.

[Swinfen Eady M.R. Must we not start with this, that the intention of the Legislature was to enlarge the right of registration and to include surnames?]

Ample effect can be given to the section while keeping the registrability of surnames within narrow limits.

[Eve J. I doubt whether the uncommonness of a name is a factor we ought to take into consideration.]

It is only where the name is uncommon as in *Teofani's Case* (1) that the registration ought to be allowed to proceed. All the members of the Court in that case adopted the test whether the name was a common one. The statute contemplates the registration of names which are so peculiar as to be distinctive of the goods in respect of which they are used.

As to distinctiveness by user, the evidence of length of user in the present case falls far short of that in other cases. Here the name has only been used in this country for three and a half years. There are only five instances in which the Court has directed an application for registration of a surname to proceed; namely, in *Lodge's Case* (2); *Cadbury's Case* (3); *Avery's Case* (4); *Muratti's Case* (5); and the *Daimler Case.* (6) In *Teofani's Case* (1) the name although not directed by the Court to be placed on the register was held to be rightly placed there.

Kerly K.C. in reply. The *Daimler Case* (6) merely followed the *Teofani Case* (1) without considering the limits of that case.

As to the protection afforded by s. 44 see the observations

(1) [1913] 2 Ch. 545.
(2) 35 Rep. Pat. Cas. 222.
(3) [1915] 1 Ch. 331.
(4) 36 Rep. Pat. Cas. 89.
(5) (1915) 32 Rep. Pat. Cas. 77.
(6) (1916) 33 Rep. Pat. Cas. 337.

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

of Parker J. in *In re Gramophone Co.'s Application* (1) and of Warrington L.J. in *In re National Cash Register Co.'s Application.* (2)

Cur. adv. vult.

March 14. Swinfen Eady M.R. read the following judgment :—This is an application under s. 9, para. 5, of the Trade Marks Act, 1905 (by way of appeal from Sargant J.), that the Registrar of Trade Marks may be directed to proceed with the application to register the word "Burford" as a trade mark in class 22 for commercial motor vehicles. [His Lordship stated the facts and the nature and effect of the evidence as above set out and continued :] Thus the evidence establishes that the word "Burford" has been used by the company, since its formation, as a trade mark, and that it has served to distinguish its vehicles from those of all other makers. There is therefore some evidence, although by no means conclusive, that the word is "adapted to distinguish"; but even if the mark be in fact distinctive, the tribunal is not bound to allow the application to proceed, but has a discretion in the matter. Other circumstances must be taken into account before that question can be answered, of which Lord Shaw approved in *Registrar of Trade Marks* v. *W. & G. Du Cros, Ltd.* (3): "Will the registration of the trade mark cause substantial difficulty or confusion in view of the rights of user by other traders?" Now we know that similar word marks of other motor car makers have been registered for years without causing any difficulty or confusion, even though (as in the *Daimler Case* (4)) the word forms part of the name of other companies. Again the business of a manufacturer of motor vehicles is one requiring considerable works and capital, and much plant and machinery, and the number of such manufacturers in the United Kingdom is not large. The materiality of this is that the names of all the manufacturers are well known to the trade, and if there was any other person of the name of

(1) [1910] 2 Ch. 423, 434, 435.
(2) (1917) 34 Rep. Pat. Cas. 354, 361.
(3) [1913] A. C. 624, 631.
(4) 33 Rep, Pat. Cas. 337.

Burford already a manufacturer of cars or parts that fact would be readily ascertained. It is not like the case of a trade in smaller and less expensive articles, where there may be numerous persons engaged in it, in different parts of the kingdom, ignorant of the existence of others so engaged, or of the trade marks which they are using. A conspicuous instance of this occurred in *J. Wigfull & Sons, Ltd.* v. *J. Jackson & Son, Ltd.* (1). where persons having used the trade mark of a wheatsheaf in the Sheffield district for many years (such user having been purely local) were wholly unaware that outside their district the user of the same mark was common to the trade. In many cases s. 44 of the Act would not be a sufficient protection to traders, who had used a mark extensively, though without having registered it, or who had used some trade description of their goods, with the continued use of which a new registration of a trade mark by someone else might interfere. But in a manufacturing business of the present kind no objection on this ground could be sustained.

Again, although the name "Burford" cannot be described as quite uncommon, it is nevertheless not a common name, and no single person of that name is engaged, so far as at present can be discovered, in manufacturing motor cars or any parts of motor cars. And, having regard to the way in which the applicants have in and since 1915 been using the word "Burford" as their trade mark on all cars, it is manifest that (whether the trade mark be registered or not) no one now starting to manufacture or sell motor vehicles, even if his surname be Burford, could use the word "Burford" as his trade mark, or pass off his cars as "Burford" cars, without rendering himself liable to legal proceedings, although he could certainly make and sell motor cars under his own name, and would not in the least be obstructed or prevented from doing so if the present application to register were allowed.

Mr. Simonds urged that the registration of a surname as a trade mark ought to be limited to those cases where there were not more than two or three individuals in England of that name, as in the *Teofani Case* (2), and that practically

(1) [1916] 1 Ch. 213. (2) [1913] 2 Ch. 545.

C. A. 1919

H. G. BURFORD & Co.'s APPLICATION, *In re.*

Swinfen Eady M.R.

such registration would be limited to the names of foreign origin. I am quite unable to accept that view.

Sect. 9, para. 5, was introduced because it was found that names were in fact being used as trade marks, and in some cases had certainly served to distinguish the goods of the proprietor of the trade mark from those of other persons, and it was desired to extend the advantage gained by registration to those surnames which the Court might consider "distinctive marks," on a review of all the circumstances of the case.

In *Registrar of Trade Marks* v. *W. & G. Du Cros, Ltd.* (*W. & G. Case*) (1) Lord Parker pointed out that initials were even less adapted for trade mark purposes than names; and there is greater difficulty still about words which are descriptive, unless obviously used in a non-descriptive sense, as "Black and White" for whiskey.

In the present case the weakest spot in the case of the applicants is that the mark has been used by them only since 1915; but, having regard to the nature of the business, and to the rapid growth and increase of their trade, and to the high reputation which it is shown that their goods have already acquired, and to the wide area over which this extends, I am of opinion that the short period is not a fatal objection. When it is once clearly established that the name has become distinctive the fact that it has achieved this purpose in a short time ought not to prevent its registration. If the applicants were to use their common law trade mark for another twenty years, and vastly increase their business, and then apply for registration, it would still be open to urge the objection now put forward, that some Burford yet unborn might arise at a future time, and that if he entered the motor trade, and made and sold vehicles under his own name, then the trade mark of the applicants would not be sufficient to distinguish their goods from the goods of the new Burford. No length of user until there is another Burford in the field would meet this objection. Length of user is in my opinion only important in considering the question of fact, whether

(1) [1913] A. C. 624, 636.

the name mark has really and truly become distinctive of the applicants' goods.

I agree with what was said by Kennedy L.J. in *In re Tecfani and Co.'s Trade Mark* (1), that an application for the admittance of a surname to registration ought to be most closely scrutinized, and the acceptance of it obtained only where its distinctive character is quite clearly proved, and that it is no argument against this view that a certain degree of protection is given to other persons having the same surname by s. 44.

In the present case, however, I am of opinion that the distinctive character of the word "Burford" has been quite clearly proved, and that this appeal should be allowed, and the application be directed to proceed.

SCRUTTON L.J. read the following judgment:—The Trade Marks Act, 1905, by s. 9 requires that a registrable trade mark shall contain either one of certain matters mentioned in the first four paragraphs, which expressly exclude a surname, or by par. 5, "any other distinctive mark," that is "a mark adapted to distinguish the goods of the proprietor of the trade mark from those of other persons." The section further provides that any name, signature, or word or words which does not fall within the first four paragraphs shall not, except by order of the Board of Trade or the Court, be deemed a distinctive mark, but that the Court may in the case of trade marks in actual use take into consideration the extent to which such user has rendered such trade mark in fact distinctive for the goods with respect to which it is registered or proposed to be registered.

Messrs. H. G. Burford, Ltd., a company founded by one H. G. Burford and in which he is still engaged, desire to register the surname "Burford" as a trade mark for commercial motors. The Board of Trade referred the matter to the Court, and Sargant J. declined to make an order that the name should be deemed distinctive. The applicants appeal to this Court. The effect of such an order will be that the proposal to register the trade mark will be advertised, and

(1) [1913] 2 Ch., 545, 569.

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

Scrutton L.J.

other members of the public desiring to object to it may come in, tender evidence, and object, and the decision of this Court will not bind the tribunal before whom the matter is discussed, except on the point that the name may by user be adapted to distinguish.

The object of the section has been explained with high authority by Fletcher Moulton L.J. in the *Perfection Case.* (1) It was intended to allow all classes of words to be used as trade marks, after a judicial examination of the particular merits of each, if on such examination the word appeared either in itself adapted to distinguish, or, though not so adapted, to have acquired by user a distinctive character.

The nature of the evidence of user required in the case of a word prima facie unsuitable is a question of degree, varying with the original unsuitability. Descriptive words are prima facie unsuitable, because, as everyone has a right to make goods answering to the description, the description does not distinguish those of a particular maker. But very strong evidence of user may show that the apparently unsuitable word does in fact distinguish certain goods as those of a particular maker. Very strong evidence would however be needed. The same remark applies to geographical names which prima facie would apply to any goods of the class made in the country in question, but may by strong evidence of user be shown to distinguish or denote those of a particular maker. Surnames in the same way, prima facie are adapted to distinguish the goods to which they are affixed from goods made or sold by persons who do not bear that surname, but as Hamilton L.J. says in *In re R. J. Lea Ltd.'s Application* (2), tend to confuse those goods with goods made or sold by other persons who do bear that surname. It seems to me as at present advised, though I do not wish finally to decide the point, that surnames are prima facie not adapted to distinguish goods as those of a particular maker, so that if a man applied to use one as a trade mark, without evidence of previous user, the Court could not hold the name

(1) *In re Joseph Crosfield & Sons, Ltd.* [1910] 1 Ch. 130, 144–148.
(2) [1913] 1 Ch. 446, 464.

distinctive. But I am clearly of opinion that evidence of user may show that in fact a particular surname has become distinctive of the goods of a particular maker. It appears logically to follow that, the rarer a surname, the less difficult it is to show that it has become distinctive of a particular trader. One unfortunate consequence of this has been that foreign surnames and foreign traders have found it easier to get protection than traders bearing English surnames. "Teofani" (1), "Muratti" (2), and "Daimler" (3) have been allowed as trade marks largely on the ground that being foreign names they are rare. In the *Daimler Case* (3) Sargant J. and the Comptroller's counsel expressly rely on the reason that the name is a foreign and not an English name.

In my opinion all these applications to monopolize surnames should be scrutinized with extreme care and caution; but the fact that the applicant is a foreigner, or the name foreign, should be regarded as a reason for greater rather than less strictness. For the Court has less opportunities for ascertaining the number of persons bearing foreign surnames, and less possibilities of being certain that all members of the foreign clan hear of and can oppose the application. While if under international arrangements an English trade mark is a valuable feature in securing a trade mark in a foreign country, the Court should be very careful lest by an indirect method it should give a foreigner a benefit abroad which he might not be able to get directly.

The question therefore in this case is whether the applicants fulfil the burden of satisfying the Court that "Burford," an English surname borne by other people than H. G. Burford, has by actual user as a trade mark become distinctive of their goods. I think, as at present advised, that the word is prima facie not adapted to distinguish their goods, for if a second Burford made motor cars, his purchasers would very likely speak of his cars as "Burfords" and he himself might naturally so name them. I am not impressed by the argument that a second Burford finding

(1) [1913] 2 Ch. 545. (2) 32 Rep. Pat. Cas. 77.
(3) 33 Rep. Pat. Cas. 337.

C. A. 1919

H. G. BURFORD & CO.'S APPLICATION, *In re.*

Scrutton L.J.

the first Burford using the name should at once avoid it. I cannot see that a man who has admittedly no right to the monopoly of a surname can get it as soon as he begins to use the surname only instead of his full name ; it seems to me that the same argument would allow him also to monopolize a descriptive word and to say because once he had begun to use it, no one else ought honestly to desire to use it.

The facts here are that the applicants have used the name as a trade mark for three and a half years in war time, a time in which it is notorious that while some people have been able very rapidly to develop large businesses, others, through no fault of their own, have been stopped from developing them at all. They do not mention the number of cars on which they have used it ; their output is about 210,000*l.* in three years, perhaps 420 cars, or one for every hundred thousand inhabitants of the United Kingdom, or 140 a year. As commercial cars are frequently bought in fleets, several to one customer, this represents less than 400 customers. They produce a number of affidavits, seven from trade users in London (three), Manchester, Liverpool, Durham, and Colchester, eight from dealers in motor cars in London (three), Liverpool, Birmingham, Bristol, Cardiff, and Sheffield, one journalist in Ireland, one in Scotland, four from other makers, and two from trade associations. They have spent about 20*l.* a week in advertisements, not a very extravagant amount for publicity.

The judge has found, and I do not disagree with him, that the evidence shows a present trade reputation or distinctiveness. If the firm is the only person at present in the trade using that name, probably the same affidavits could be got after a year's user or less. A customer would naturally say, "The name means to me the shop with which I deal, and I know of no other" ; so would the newspapers with whom the firm advertises ; and the agents who sell the cars ; and yet the general public, even if they use cars, might be entirely ignorant of the name, which would not be to them at all distinctive. In my view the trade mark should be distinctive to those who do not use the particular article, as well as to

those who know of it because they use the article. I cannot think that only one affidavit from Scotland, and one from Ireland, and one from Yorkshire, and one from the Western Counties, and one from the Eastern Counties, and one from Wales, covering only three and a half years' user, are sufficient to prove distinctiveness giving a monopoly over the whole of the United Kingdom. I know of no case where a word, prima facie not adapted to distinguish, which therefore would probably not be given protection before it had been actually used, has acquired sufficient distinctiveness to receive protection by only three and a half years' user. The users reported in cases where such words have been allowed by the Court are: Cadbury, sixty years; Teofani, twenty-two years; Lodge, nine years (the most favourable case for the applicants); Muratti, twenty-eight years; Daimler, eighteen years (with an output of 9,000,000*l.*); Avery, over one hundred years; Crawford, with seventy years' trade, has been refused. A large number of cases have been passed by the Board of Trade before 1910; but after the *Perfection Case* (1) in that year, the number has been much limited; increasing slightly again after the *Teofani Case* (2) in 1913. It appears to me difficult if this application is allowed to refuse any first user of a surname in a comparatively new trade after a very short exclusive user.

For these reasons if I were sitting as a judge of first instance I should feel great difficulty in allowing the application to proceed, but, as I am asked to differ from a judge of first instance on what is really a question of fact, I do not think I ought to do it unless I am clearly of opinion that he is wrong. As I am not only doubtful, but inclined to think that he is right on such a short user to refuse the application, I think the appeal should be at present dismissed. Further length of sole user may, in my opinion, confer sufficient distinctiveness to enable the application to succeed.

I do not, as I understand, differ from my brothers on any question of law, but only on the amount of evidence which

(1) *In re Joseph Crosfield & Sons, Ltd.* [1910] 1 Ch. 130.
(2) [1913] 2 Ch. 545.

C. A. 1919

H. G. Burford & Co.'s Application, *In re.*

Scrutton L.J.

should be required to acquire a monopoly in a name not prima facie adapted to distinguish, and not the peculiar property of the man using it. I think if this application is granted the decision goes far beyond any case yet decided and reported in the courts; it constitutes in reality a change in policy, and after it it will be difficult to refuse any first user of a descriptive word or surname, who can easily procure from his customers and the papers in which he advertises the evidence given in this case.

Eve J. read the following judgment:—In dealing with an application to register a surname, which prima facie is not a distinctive mark in that it is not adapted to distinguish the goods of the proprietor from those of other persons bearing the same surname, but which is alleged to have become distinctive by user, I apprehend that the following factors are all such as ought to be taken into consideration: (1.) The extent to which the actual user down to the date of the application has in fact rendered the mark distinctive of the applicant's goods. (2.) The probability or the reverse of this degree of distinctiveness being maintained in the future—and in connection with this (3.) The characteristics of the name, that is to say, is it a very unusual name, or an unusual one, or one in common use? (4.) The trade or manufacture in which the name is employed. Is it one restricted to a comparatively small class of the community, or is it one on which a large number of individuals are likely to embark? Is it one in which the employment of a surname is at all common? as, for example, is the case in relation to marmalade and jams, which are almost universally spoken of by the names of the manufacturers, such as Keiller, Moir, Cairns, Pink, Beach, Crosse & Blackwell, and many others. (5.) The class of goods of which the mark is distinctive and the way in which it is used in connection with them. Are they goods in which the mark is a prominent feature? (6.) Are there any circumstances calculated to induce the belief that the present distinctiveness is due to temporary or exceptional causes, such, for example, as the existence of current patents

or of contracts restricting competition by other members of the family? (7.) The extent to which registration will control the freedom of individuals of the same surname who may hereafter embark on the manufacture of the same goods. (8.) Will registration tend to protect the public from imposition, or the reverse?

I cannot help thinking that in some of the reported cases too much has been made of what I have spoken of as the characteristics of the name. Although in an application to register a surname, unsupported by evidence of distinctiveness due to actual user as a mark, the question whether the name is a very unusual or a common one would obviously be material, and although it may well be that it is more difficult to establish distinctiveness by user in the case of a common than in the case of an uncommon name, I think in the latter class of case, when once distinctiveness by user has been established, the question whether the name is a common one or not ceases to be a factor of outstanding importance, and falls back to the level of the other factors which have to be taken into consideration. To maintain its prominence when distinctiveness by user has been established appears to me to give the owners of uncommon names an unfair advantage, and to be calculated to extend to traders possessed of foreign patronymics a preference which I decline to believe the Legislature could have intended them to enjoy.

In the present case we have, I think, in the evidence sufficient materials on which to form an opinion on all the essential considerations. That evidence does, I think, establish that the name "Burford" is distinctive, in the United Kingdom, of the applicant's commercial motor vehicles, not only to persons connected with the motor trade, but to buyers and users of and, I think one can add, to persons interested in such vehicles; and no circumstances have been disclosed or suggested to show that this distinctiveness has been brought about by any means other than legitimate trading and advertising, or is in any way due to temporary or exceptional causes. Further, I think the name may fairly be classed as

C. A. 1919

H. G. BURFORD & CO.'S APPLICATION, *In re.*

Eve J.

an unusual one, and the trade or manufacture as a limited and restricted one. It must of necessity involve the employment of a considerable capital in buildings, machinery, plant and tools. Finally, the goods manufactured are articles on which the name is prominently displayed, and which are commonly and by the public generally identified and spoken of by reference to the name by which they are known in the market.

So far therefore as the first six of the factors I have enumerated above are concerned, I think the applicants are entitled to claim that a just estimate of the aggregate weight to be attached to them in the circumstances here existing points strongly in favour of permitting registration.

The question then remains whether this conclusion is outweighed by any possible injustice which registration may inflict upon members of the Burford family who may hereafter engage in the manufacture of similar goods, or by any possible detriment accruing to the general public in consequence of allowing registration to proceed.

Sect. 44 of the Act undoubtedly affords considerable protection to the potential manufacturer, but it has been suggested that in common with other manufacturers he might desire to distinguish his goods by attaching his own name to them as a distinctive mark, and that registration will unfairly deprive him of this opportunity. I do not think this suggestion is well founded, and for this reason; the word "Burford" having already become distinctive of the goods manufactured by the applicants, no honest manufacturer—and it is of course only the honest manufacturer who has to be protected—could in the future apply the same appellation to his goods, whether the word is registered or not. It is not therefore by registration, but by the state of things by which the word has already become distinctive of the applicant's goods that the future manufacturer is debarred from adopting the same word for his goods. In short, registration will, in my opinion, put him in no more unfavourable position in this respect than he is in already by reason of the accomplished fact which is the very

foundation of the application. In other respects he will I think be sufficiently protected by s. 44, and I can see no valid ground why this application should be refused for the protection of the potential manufacturer.

The same reasoning applies to the general public. Whether this registration proceeds or not, the word "Burford" will continue to be distinctive of the applicants' goods, and no future Burford who starts manufacturing similar goods will be permitted to put them on the market under that name alone. The position of the public, therefore, so far, is for practical purposes identical whether the name is registered or not. In either case they must be prepared in the event of a future Burford manufacturing similar goods to discriminate between the goods sold under the applicants' name or mark, and the goods sold under the name or mark selected by the second or subsequent manufacturer. I cannot, therefore, see that registration will prejudicially affect the public any more than the potential manufacturer. On the contrary, registration will in all probability indirectly assist the public to discriminate, in that the later manufacturer being in consequence thereof exposed to the additional risk of an action for infringement will probably exercise more caution in selecting his name or mark than he would do if the only risk he ran was of an action for passing off.

I do not think the argument that the making of an order in this or any other case will lead to numerous further applications of a similar character is one to which we ought to attach any importance. The Act was framed to stimulate commercial enterprise by giving the trader adequate protection for the results of his enterprise, and every application to obtain that protection must be decided on its own merits whatever the consequences may be. I venture to think that, having regard to the full opportunities afforded to all who may object to the registration being completed to show cause why it should not be completed, the Court ought not to be astute to discover reasons for refusing the application in limine, but should incline rather to extending to the trader who has honestly and legitimately used a mark a fair opportunity

BIBL. LONDIN UNIV.

C. A. 1919

H. G. BURFORD & CO.'S APPLICATION, *In re*.

of establishing his right to the statutory protection for the same.

In my opinion this is a case in which we ought to allow the application to proceed.

Appeal allowed.

Solicitor for the appellants : *J. Montague Haslip.*
Solicitor for the respondent : *Solicitor to the Board of Trade.*

W. I. C.

PETERSON J.

1919

March 11, 12; *April* 2.

In re RICHARDSON.

POLE *v.* PATTENDEN.

[1918 R. 647.]

Administration—Account—Executor Solicitor—Action by Beneficiary—Share of Residue—Lapse of Time—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-s.* (1.), (*a*) *and* (*b*).

The real and personal estate of a testator who died in 1909 was administered by his widow and the defendant as executors of his will, and their functions came to an end in 1910. Under the will the testator's widow was absolutely entitled to all his residuary real and personal estate. Some of the securities belonging to the estate remained in the joint names of the executors at the request of the widow. No formal accounts of the estate were prepared, but the defendant, who was a solicitor, informed the widow of all that was done, and about the end of 1910 prepared and gave her a book containing all the particulars of her property. The widow died in 1917, and the plaintiffs were beneficiaries under her will, the defendant being also one of her executors. In 1918 the plaintiffs brought their action for the administration of the testator's estate, and required accounts from the defendant of his dealings with it. There was no allegation that any part of the estate had been misapplied. The Trustee Act, 1888, s. 8, was relied on as a defence to the action:—

Held, that the action was one to recover a legacy within s. 8 of the Real Property Limitation Act, 1874, and as there was thus an existing Statute of Limitations applicable, s. 8, sub-s. (1.) (*b*), of the Trustee Act, 1888, did not apply, and was no defence. But *held*, that s. 8, sub-s. (1.) (*a*), applied to an action against an executor for an account, and the claim was barred by the lapse of six years as to all items in the account which

did not fall within any of the exceptions in s. 8, sub-s. (1.). *Lacons v. Warmoll* [1907] 2 K. B. 350, 364 and *In re Croyden* (1911) 55 Sol. J. 632 followed.

Held, further, that the usual accounts would be directed against the defendant as executor in order to ascertain the facts. *In re Blow* [1914] 1 Ch. 233, 243 applied.

ADJOURNED SUMMONS.

By this originating summons Joanna Pole, widow, and Alexander Charles Reginald Pole asked for the administration of the personal estate of Charles Garner Richardson, the claim to have the real estate also administered having been abandoned. Charles Garner Richardson died on July 30, 1909, having by his will, dated August 11, 1908, appointed his wife, Caroline Seaborne Richardson, and the defendant, Charles Robert Edwin Pattenden, executors thereof, and after making divers pecuniary bequests the testator devised and bequeathed the residue of his estate both real and personal to his wife absolutely. Both executors proved the will. The testator left considerable real and personal estate of which the executors possessed themselves.

Mrs. Richardson died on January 22, 1917, having by her will, dated May 3, 1915, appointed the plaintiff, Joanna Pole, and the defendant, executors and trustees thereof, and after giving beneficial interests to both the plaintiffs, she devised and bequeathed her residuary real and personal estate to the second plaintiff, A. C. R. Pole, absolutely.

The defendant was a solicitor and, according to the evidence, Mrs. Richardson, who was a very old lady, left to him the active management of the administration of the estate of C. G. Richardson. The testator's debts and the legacies given by his will were duly provided for, and the functions of the executors as such came to an end in 1910. After the death of Mrs. Richardson it appeared that certain stocks and shares which formed part of the testator's estate, to which Mrs. Richardson was absolutely entitled as residuary legatee, remained standing in the joint names of the executors, but, on the evidence, this was at the request of Mrs. Richardson in her lifetime as she desired to save the cost of stamps on

PETERSON J. 1919 RICHARDSON, *In re.* POLE *v.* PATTENDEN.

transfers. These securities were thus held by the executors not as executors but as trustees for Mrs. Richardson. No accounts appear to have been rendered by the defendant to Mrs. Richardson, but he alleged in his affidavit that he did nothing in the administration without the concurrence of his co-executrix, and that in or about the year 1910 he prepared a book in which were inserted particulars of the whole of Mrs. Richardson's estate, whether derived from the testator or from other sources, and handed her a copy thereof. The defendant also alleged that since the winding up of the estate in 1910 he had not had in his hands any amounts of the testator as his estate. The plaintiffs did not suggest any misconduct on the part of the defendant, but on August 27, 1918, they issued their summons for the purpose of ascertaining of what the testator's estate consisted.

Tomlin K.C. and *A. Adams* for the plaintiffs. The plaintiffs are entitled as of right to know what the estate of the testator consisted of. It is admitted that a number of stocks and shares remained in the joint names of the executors after the estate had been wound up in 1910: *Cheese* v. *Keen.* (1) The defendant was in a fiduciary relationship with Mrs. Richardson. That is sufficient to entitle the plaintiffs to have proper accounts delivered. The Trustee Act, 1888, s. 8, has no application here. It comes under the Real Property Act, 1874, s. 8, and twelve years have not expired since the estate was wound up.

Hughes K.C. and *F. E. Farrer* for the defendant. No administration order should be made: there is no demand for payment of what may be found due. The estate was wound up more than six years ago, no complaint was ever made by Mrs. Richardson, who received the income of the whole estate down to her death, and the matter should not be reopened. With regard to the stocks and shares standing in the joint names after 1910 and at Mrs. Richardson's death, they were in the names of the executors as trustees for Mrs. Richardson, and not as executors of the testator. The

(1) [1908] 1 Ch. 245.

Trustee Act, 1888, s. 8, sub-s. (1.) (*a*) and (*b*), applies, and is a bar to this action. Its object was to prevent such proceedings as the present action. In *In re Page* (1) this Act was held to apply. In that case there was fiduciary relationship and it was a much stronger case than the present. The facts were somewhat similar, and no account had been rendered to the plaintiff. In *In re Blow* (2), which was a creditor's administration action, it was held that an executor could plead the Trustee Act, 1888, against a creditor in like manner as an express trustee could plead it against his cestui que trust. *How* v. *Earl Winterton* (3) was there discussed and applied.

Whether the claim is by a creditor, or a beneficiary, and for an administration, or an account, the Trustee Act, 1888, is a complete answer after the lapse of six years from when the right of action accrued unless the case comes within the exceptions in s. 8, sub-s. (1.). We come within sub-clause (*a*). As to (*b*) this action is one to which no existing Statute of Limitations applies: *In re Timmis.* (4) If it is held to be an action for a legacy the statute of 1874 might be applicable and twelve years be the time within which an action could be brought, but we submit that it is not such an action.

[PETERSON J. referred to Darby and Bosanquet on Statutes of Limitations, 2nd ed., pp. 182, 183, *Prior* v. *Horniblow* (5), and *In re Johnson* (6) as to an action for a legacy, including one for a share of residue.]

This is an administration action, and it is difficult to say that it is an action to recover a legacy. The executors have long ago administered the whole of the estate. Our contention is that s. 8 of the Act of 1874 has been abrogated by s. 8 of the Trustee Act, 1888, which was intended to protect trustees and executors. Apart from the defence under the statute this is in reality a claim by mere volunteers. The plaintiffs sue as legatees of Mrs. Richardson. The relation of trustee and cestui que trust does not exist between a solicitor and

(1) [1893] 1 Ch. 304.
(2) [1914] 1 Ch. 233, 241.
(3) [1896] 2 Ch. 626.
(4) [1902] 1 Ch. 176.
(5) (1836) 2 Y. & C. Ex. 200, 206.
(6) (1885) 29 Ch. D. 964.

PETERSON J. 1919 RICHARDSON, *In re.* POLE *v.* PATTENDEN.

his client. There is nothing to prevent the solicitor pleading the statute: Darby and Bosanquet on Statutes of Limitations, 2nd ed., p. 11. [They also referred to *In re Marsden* (1) and *In re Hyatt.* (2)]

Tomlin K.C. in reply. This case does not come within either sub-clause (*a*) or sub-clause (*b*) of sub-s. (1.) of s. 8 of the Trustee Act, 1888. It is a claim to recover a legacy to which the statute of 1874 applies, so it is not within (*b*): *In re Allsop.* (3) *In re Page* (4) was the case of an express trust to which no Statute of Limitations applied. So was *How* v. *Earl Winterton.* (5)

[PETERSON J. referred to *Adams* v. *Barry.* (6)]

Cur. adv. vult.

April 2. PETERSON J. [after stating the facts, continued: The plaintiffs have required the defendant to deliver accounts showing his dealings with the estate of Mr. Richardson as the active executor under Mr. Richardson's will. The defendant contends that by virtue of the Trustee Act, 1888, the plaintiffs are not entitled to call upon him to account. The plaintiffs do not in these proceedings allege that the defendant has in fact misapplied any of the estate. They do not know of what the estate consisted, and the present endeavour is to obtain such accounts as will show what the estate consisted of, and how it was administered by the defendant. The claim then is for an account of the personal estate come to the hands of the defendant as executor. The action is one to recover a legacy within s. 8 of the Real Property Limitation Act, 1874 (see *Adams* v. *Barry* (6); *Prior* v. *Horniblow* (7); *Christian* v. *Devereux* (8), which were decisions on the corresponding section of 3 & 4 Will. 4, c. 27); and as there is thus an existing Statute of Limitations which is applicable, s. 8 (1.) (*b*) of the Trustee Act, 1888, does not appear to apply to this case. Cases such as *In re Blow* (9) stand on a different

(1) (1884) 26 Ch. D. 783.
(2) (1888) 38 Ch. D. 609.
(3) [1914] 1 Ch. 1, 9.
(4) [1893] 1 Ch. 304.
(5) [1896] 2 Ch. 626.
(6) (1845) 2 Coll. 285, 290.
(7) 2 Y. & C. Ex. 200.
(8) (1841) 12 Sim. 264.
(9) [1914] 1 Ch. 233.

footing, as they were actions to enforce claims by creditors against executors, and to such actions the Act of 1874 does not apply. Nor do the decisions in such cases as *In re Page* (1) and *How* v. *Earl Winterton* (2), which were cited on behalf of the defendant, seem to assist, as they were cases not of executors but of express trustees, and as such came within s. 8 (1.) (*b*). If the plaintiff's contention that this claim can only be barred by the lapse of twelve years is correct, the singular result is reached that express trustees are placed in a more favourable position than executors or administrators. The question appears to be whether, having regard to the fact that by s. 1 the word "trustee" includes an executor, s. 8 (1.) (*a*) applies to the case of an action against an executor for an account. The cases seem to stand in this way. In *How* v. *Earl Winterton* (2), which was a case of an express trustee, the effect of sub-clause (*a*) was considered, and Rigby L.J. expressed the view that where a Statute of Limitations applied to an action for breach of duty it would apply to breach of duty by a trustee in the same way as if in committing the breach of duty he had not been a trustee. In *In re Timmis* (3) the only question argued was whether s. 8 (1.) (*b*) applied, and Kekewich J. held that the action was not one to recover a legacy and that consequently this sub-clause did apply. It was unnecessary for him to consider the effect of sub-clause (*a*), and he did not in fact do so. It is true that he stated that if an existing Statute of Limitations applies then the Act of 1888 does not apply, but this observation must, I think, in the circumstances have been directed to the operation of sub-clause (*b*). In *Lacons* v. *Warmoll* (4), which was an action by a creditor against an executor, Fletcher Moulton L.J. expressed the opinion that since the passing of the Trustee Act, 1888, the liability of an executor in respect of moneys honestly paid away by him was barred at the expiry of six years from the date of the payment, whatever be the form of the proceedings by which it was sought to enforce the liability; and this

(1) [1893] 1 Ch. 304.
(2) [1896] 2 Ch. 626.
(3) [1902] 1 Ch. 176.
(4) [1907] 2 K. B. 350, 364.

PETERSON J. 1919 RICHARDSON, *In re.* POLE *v.* PATTENDEN.

view of the law was endorsed by the present Master of the Rolls in *In re Blow* (1), which also was a creditor's action against an executor. There is, I find, one case in which a claim by a beneficiary against an executor who had honestly misapplied the estate of his testator was held to be barred by the lapse of six years under the provisions of the Trustee Act, 1888. This is the case of *In re Croyden.* (2) Edward Croyden, the testator, died in 1891 intestate as to one moiety of his residuary estate. The executors in 1892 paid away part of this moiety to persons who were not entitled to it. Roberts was one of the executors. Eve J. held that the claim to administer Roberts' estate was barred by s. 8 of the Trustee Act, 1888. Now this claim came within s. 13 of the Act 23 & 24 Vict. c. 38, under which a claim to recover personal estate of a person who dies intestate is barred by the lapse of twenty years: *In re Lacy* (3) and *In re Johnson.* (4) There was therefore an existing Statute of Limitations, which was applicable if the case came otherwise within s. 8 (1.) (*b*) of the Act of 1888. The report of *In re Croyden* (2) does not indicate whether the learned judge decided within which of the two sub-clauses (*a*) and (*b*) the case came; but the Act of 23 & 24 Vict. c. 38 can hardly have escaped his attention. This decision in *In re Croyden* (2) was referred to without any adverse comment in *In re Blow* (1) by the present Master of the Rolls, who concurred in the view of Fletcher Moulton L.J. as to the application of the Act of 1888 to the liability of an executor: *Lacons* v. *Warmoll.* (5) I think that I ought to follow the decision of Eve J. in *In re Croyden* (2) if the circumstances of the case are such that it does not come within the exceptions mentioned in s. 8 (1.) of the Trustee Act, 1888. But as Cozens-Hardy M.R. pointed out in *In re Blow* (6), it may often be desirable to direct a full account to be taken in order to ascertain whether the case falls within these exceptions and to deal with the applicability of s. 8 when the facts have been established. Where, for instance,

(1) [1914] 1 Ch. 233, 247.
(2) 55 Sol. J. 632.
(3) [1899] 2 Ch. 149
(4) 29 Ch. D. 964.
(5) [1907] 2 K. B. 350, 364.
(6) [1914] 1 Ch. 243.

the persons entitled do not know what the estate consisted of when it reached the hands of an executor or trustee it is impossible for them to charge the executor or trustee with retaining part of it in his own hands, or converting it to his own use; and the only way in which it can be ascertained whether part of the estate still remains in the hands of the executor or trustee is by taking the account. The statute would then apply to all items in the account which do not come within the exceptions in s. 8, and would not free the executor or trustee from liability in cases which come within the exceptions. In the present case the plaintiffs do not know what the estate consisted of, nor, beyond the fact that the debts and legacies were paid, and that certain property forming part of the estate came to the hands of Mrs. Richardson, do they know what became of the estate. In these circumstances I am prepared to follow the suggestion of Cozens-Hardy M.R. and direct the usual accounts against the defendant as executor, leaving the question which items are protected by the Act of 1888 to be dealt with when the facts have been ascertained. I reserve the costs of the present application.

Solicitors: *Stow, Preston & Lyttelton, for Macdonald & Longrigg, Bath; Justice & Pattenden.*

G. M.

P. O. LAWRENCE J.

1919

March 26; *April* 7.

In re WRAGG.

WRAGG *v.* PALMER.

[1918 W. 1589.]

Will—Construction—Real and Personal Estate—Trust for Sale—Power to postpone—Investment Clause—Unsold Real Estate—Settled Shares of Residue—Appropriation in Specie.

A testator devised and bequeathed the remainder of his personal estate and all his real estate to his executors upon trusts for sale and conversion, and to stand possessed of the proceeds after payment of debts, etc., upon trust for all his children equally, and the testator settled the share of each daughter upon usual trusts. Clauses 5 and 6 of the will gave the trustees a discretionary power to postpone the sale and conversion of the residuary estate during such period as they should think fit, and to manage and let the real estate until sold as if they were the absolute beneficial owners thereof. Clause 8 authorized the trustees in their discretion to continue any investments the testator might have at his death, notwithstanding that they might not be of the nature of trust investments, and Clause 10 authorized the trustees to invest any money forming part of his trust estate upon such stocks, funds, shares and securities or other investments of whatsoever nature and wheresoever as his trustees should in their absolute and uncontrolled discretion think fit with the like power of varying such investments to the intent that his trustees should have the same full and unrestricted powers of investing and transposing investments as if they were absolutely entitled thereto beneficially. There was no express power to retain real estate unconverted during the trust and no express power of appropriation. All the debts, etc., had been paid, and the executors held the clear residue of the estate as trustees, and desired to appropriate parts of the residuary real estate towards satisfaction of the settled shares of the married daughters:—

Held, that upon the true construction of Clause 10 the trustees had power to invest in the purchase of real estate, and could therefore validly appropriate parts of the unsold real estate in or towards satisfaction of the settled shares of the married daughters.

Quaere, whether Clauses 5 to 8 conferred on the trustees power to retain the residuary real estate unconverted during the continuance of the trusts.

ADJOURNED SUMMONS.

I. Wragg by his will made on February 17, 1917, appointed his sons Horace and Herbert Wragg and his brother Joseph Wragg the executors and trustees thereof and, after certain specific bequests, devised and bequeathed to them all his

real estate and the remainder of his personal estate upon trust for sale and conversion and, after payment out of the proceeds of his debts, funeral and testamentary expenses, to stand possessed of the residue of such proceeds in trust for all his children in equal shares, and the testator settled the share of each daughter upon usual trusts for the benefit of such daughter and her children. By Clause 5 of the will the testator empowered his trustees in their uncontrolled discretion to postpone during such period as they should think fit the sale, calling in and conversion of his residuary estate or any part or parts thereof, but nevertheless his real estate should for the purposes of transmission be considered as converted from the time of his death and the rents and income thereof until sale should be applied as if the same were income arising from the proceeds of such sale. Clause 6 empowered his trustees to manage and demise for any term of years and at any rent any real or leasehold hereditaments thereinbefore given in trust for sale until the same should be sold with the same uncontrolled discretion as if his trustees were absolute beneficial owners thereof. Clause 7 empowered the trustees to exchange any parts of his real estate with or without the mines and minerals thereunder. Clause 8 expressly authorized his trustees in their discretion to continue any investments he might have at his death notwithstanding that they might not be of the nature of trust investments, and to keep and retain his preference shares in Thomas Wragg & Sons, Ltd., as one of the investments of his trust estate. Clause 10 authorized his trustees to invest any moneys forming part of the trust estate in their names and at their discretion in or upon such stocks funds shares securities or other investments of whatsoever nature and wheresoever and whether involving liability or not or upon such personal credit without security as his trustees should in their absolute and uncontrolled discretion think fit and with the like absolute power of varying such investments from time to time to the intent that his trustees should have the same full and unrestricted powers of investing and transposing investments in all respects as if they were absolutely entitled thereto beneficially.

P. O. LAWRENCE J.

1919

WRAGG, *In re.*

WRAGG *v.* PALMER

The testator died in February, 1917, and his will was proved by the three executors.

The testator left seven children him surviving—namely, the two sons and five daughters. Two of the daughters were married and had infant children. The son, Horace Wragg, died soon after the testator.

The testator's real and personal estate was valued for probate at about 150,000*l.*, of which about 50,000*l.* represented the value of the real estate. He held a large number of shares in Thomas Wragg & Sons, Ltd., which was a private company incorporated in 1900 and had paid large dividends for many years, but the shares were difficult to realize. All the testator's debts, testamentary and funeral expenses had been paid, and the residuary estate was clear and was held by the surviving executors as trustees, and the question arose whether the trustees had power to appropriate some of the said shares and some of the unsold real estate to the settled shares of the daughters, and the plaintiff issued a summons to determine the matter.

The will did not contain an express power to retain the real estate unconverted during the trust nor an express power of appropriation.

H. Johnston for the plaintiff. The Land Transfer Act, 1897, s. 4, which gives executors power to appropriate, does not apply because the executors here now hold the clear residue of the estate as trustees.

It is submitted that under Clauses 8 and 10 of the will and the authorities the trustees can appropriate the shares. The difficulty is as to the real estate, but I rely on the words "of whatsoever nature and wheresoever" as words of locality. It has been decided that trustees with power "to invest as they think fit" are limited to investments authorized by law, *In re Braithwaite* (1); *In re Hazeldine* (2), and that trustees can only appropriate investments which come within the scope of the investments authorized by the will: *In re Beverly.* (3) "As they think fit" mean as they honestly

(1) (1882) 21 Ch. D. 121. (2) [1918] 1 Ch. 433.
(3) [1901] 1 Ch. 681, 684.

think fit: *In re Smith.* (1) In the case of *In re Cooke's Settlement* (2) there was a trust for sale but no power to retain investments, and Astbury J. sanctioned an appropriation in specie, but the decision seems hardly to accord with the view of Warrington J. in *In re Craven.* (3) The word "investment" has a wide meaning, and the definition of it in the Oxford English Dictionary, vol. v., p. 458, was adopted by the Court of Appeal in *In re Rayner.* (4) In that case "securities" was held to include investments, and in *In re Gent & Eason's Contract* (5) a power to vary investments was held to confer a power to sell purchased real estate, but the absence of a power to vary investments is not material: *In re Dick* (6); *In re Pope's Contract.* (7) A power to invest in ground rents has been held to authorize a purchase of ground rents: *In re Mordan.* (8) Here, under Clauses 8 and 10, the trustees have the same powers as persons absolutely and beneficially entitled, and that must include a power to invest in the purchase of and to retain real estate, and therefore they have power to appropriate this real estate to the settled shares of the married daughters.

Hildyard for the son and the unmarried daughters adopted the same line of argument. The testator has given his trustees wide powers and must have contemplated that his real estate might be retained and held upon the trusts of the will for a long period. *In re Craven* (3) only decides that you must look to the intention, and if you find the power to postpone is really and in effect equivalent to a power to retain then you can retain the real estate and appropriate.

Owen Thompson for a married daughter and her infant children. It will be for the benefit of the infants if the appropriation can go through; but the question is as to the real estate. The words "other investments" in Clause 10 must mean investments ejusdem generis with those previously mentioned and do not include moneys invested in the purchase

(1) [1896] 1 Ch. 71, 75.
(2) [1913] 2 Ch. 661.
(3) [1914] 1 Ch. 358, 365, 374.
(4) [1904] 1 Ch. 176, 182.
(5) [1905] 1 Ch. 386.
(6) [1891] 1 Ch. 423.
(7) [1911] 2 Ch. 442.
(8) [1905] 1 Ch. 515.

P. O. LAWRENCE J. 1919 WRAGG, *In re.* WRAGG *v.* PALMER.

of real estate. If that view is correct, then Clause 10 does not extend to real estate and Clause 8 only means investments in personal estate, and does not refer to real estate. *In re Cooke's Settlement* (1) is a very different case to the present. It was a settlement by deed of long leases which had existed many years, and the investment clause authorized investment in long leases.

Bethell for the other married daughter and her infant children argued to the same effect.

Church for the legal personal representatives of the deceased son supported the plaintiff's contention.

Cur. adv. vult.

April 7. P. O. LAWRENCE J., in a written judgment, after stating the facts, continued: Part of the testator's estate consists of real estate, and the trustees are desirous of appropriating portions of such real estate in or towards satisfaction of the several settled shares of the testator's daughters. There is no express power of appropriation contained in the will.

The trustees cannot effect the desired appropriation under s. 4 (1.) of the Land Transfer Act, 1897, because, even if such section had been otherwise available, it only applies to an appropriation by "the personal representatives of a deceased person," an expression which, by virtue of s. 24 (2.), means "executors or administrators of a deceased person." In the present case the executors have assented to the devise of the testator's real estate to themselves as trustees, and it is therefore not the executors as such but the devisees in trust who desire to make the appropriation. I have been referred to several cases dealing with the power of trustees to effect an appropriation of real estate in or towards satisfaction of settled shares of residue and (so far at all events as this Court is concerned) I must treat it as settled law that, in the absence of an express power, such an appropriation can only be validly effected if the trustees are authorized by the instrument creating the trust either (1.) to invest

(1) [1913] 2 Ch. 661.

moneys forming part of the trust estate in the purchase of real estate (see *In re Beverly* (1)), or (2.) to retain the real estate the subject-matter of the trust unconverted throughout the trust (see *In re Brooks* (2); *Fraser* v. *Murdoch* (3); and *In re Craven* (4)); so that in either case the real estate after the appropriation would be an authorized investment in the hands of the trustees. A mere power to postpone the sale following upon a trust to sell is not however sufficient to authorize an appropriation. In the absence of an express power to appropriate or to invest in the purchase of real estate there must, in order to authorize an appropriation, be a definite power to retain the real estate unconverted throughout the trust: *In re Craven.* (4) I do not think that Astbury J. (as was suggested during the argument) intended in *In re Cooke's Settlement* (5) to decide anything contrary to what I have stated as being my view of the law. *In re Cooke's Settlement* (5) was a case where the Court was asked to sanction a particular scheme of appropriation under exceptional circumstances, and the learned judge came to the conclusion that under the circumstances and upon the true construction of the settlement in that case the Court had jurisdiction to sanction the appropriation. The question in the present case in my opinion resolves itself into a pure question of the construction of the will of the testator. Are the trustees by the terms of the will authorized either to invest the trust moneys constituting the settled shares in the purchase of real estate or to retain the testator's real estate unconverted throughout the trust? Clause 10 of the will is relied upon as authorizing the trustees to invest in the purchase of real estate. By that clause the testator authorizes his trustees to invest any moneys forming part of the trust estate in or upon such investments "of whatever nature and wheresoever" as his trustees should in their absolute and uncontrolled discretion think fit to the intent that they should have the same full and unrestricted powers of investing as if they were absolutely entitled to the

(1) [1901] 1 Ch. 681, 688.
(2) (1897) 76 L. T. 771.
(3) (1881) 6 App. Cas. 855, 877.
(4) [1914] 1 Ch. 358, 373.
(5) [1913] 2 Ch. 661.

P. O. LAWRENCE J.

1919

WRAGG, *In re.* WRAGG *v.* PALMER.

trust moneys beneficially. It has been suggested that, having regard to what Hall V.-C. is reported as having said in *In re Braithwaite* (1) the trustees in this case can only select such investments as are authorized by law for the investment of trust funds. I do not think that case compels me to give any such limited meaning to Clause 10 of the testator's will. In my opinion it must depend in each case upon the construction of the particular instrument whether the investments authorized are confined to what are strictly trust investments or not. If authority were wanted for this proposition I need only refer to *Lewis* v. *Nobbs* (2); *In re Brown* (3); *In re Smith* (4); and *In re Hazeldine.* (5) In my judgment if real estate can properly be called "an investment" there cannot be any reasonable doubt that under the investment clause in this case the purchase of real estate is authorized. It was contended that by reason of the words "stocks funds shares and securities" which immediately precede the words "or other investments" these latter words ought to be restricted to investments ejusdem generis with stocks shares and securities. In my opinion that would be placing too narrow a construction upon Clause 10 regard being had first to the words "of whatsoever nature and wheresoever" which immediately follow, and secondly to the express declaration by the testator as to his intent at the end of the clause. I can hardly conceive that any language could have been used which would have given a wider meaning to the word "investments" than the language which the testator has used in this clause. Moreover I think that the words "and wheresoever" were rightly relied upon as at least supporting the contention that the clause contemplated that the investments might consist of immovables (such as real estate) having definite locality. Without attempting to give an exhaustive definition of the words "invest" and "investment" I think that the verb "to invest" when used in an investment clause may safely be said to include as one

(1) 21 Ch. D. 121.
(2) (1878) 8 Ch. D. 591.
(3) (1885) 29 Ch. D. 889.
(4) [1896] 1 Ch. 71.
(5) [1918] 1 Ch. 433.

of its meanings "to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield"; whilst the noun "investment" when used in such a clause may safely be said to include as one of its meanings "the property in the purchase of which the money has been so applied." No doubt in many cases the context in which the word "investments" occurs requires that this word should be confined to investments consisting of stocks shares and securities, but where the word "investments" is used without any such context, or where, as in this case, the instrument in which it occurs expressly provides that the word is not to have any such restricted meaning, I think that it includes real estate purchased as an investment. In a recent case before me, where the value of a freehold dwelling-house was in issue, the expert valuers on each side spoke of the difference between the value of the property if put up for sale subject to an existing lease, in which case they said it would only be bought as an investment and consequently would realize a smaller price, and the value of the same property if put up for sale with vacant possession, in which case it would realize a larger price as it would attract not only investors but also prospective occupiers. Moreover in the judgment of Neville J. in *In re Pope's Contract* (1), the following sentence occurs: "It is obvious that the purchase of this house was authorized and is treated merely as one of the investments that the trustees may make." These instances—if indeed examples are needed—show that in ordinary parlance real estate is spoken of as an investment if bought in order to be held for the sake of the income or profit accruing from it. The expression "investing in house property" is one which every lawyer must frequently have heard, and who could doubt that in such a case the house property purchased is properly described as "an investment"? In the case of *In re Gent & Eason's Contract* (2) it was held by Farwell J. that an express power to vary and transpose investments following upon an investment clause authorizing

(1) [1911] 2 Ch. 442, 446. (2) [1905] 1 Ch. 386.

P. O LAWRENCE J. 1919 WRAGG, *In re.* WRAGG v. PALMER.

the purchase of real estate conferred a power of sale over the real estate so purchased, and in *In re Pope's Contract* (1), Neville J. came to a similar conclusion where the power to vary investments was only implied. Whilst these cases do not actually determine the question I have to decide they undoubtedly go to show that the word "investment" is not inapt to describe real estate, at all events in cases where the investment clause expressly authorizes the purchase of real estate.

I have on the whole come to the conclusion that on the true construction of Clause 10 of the testator's will the trustees are authorized to invest the trust moneys in the purchase of real estate, and that consequently they can effect a valid appropriation of the testator's real estate in or towards satisfaction of the settled shares of the testator's daughters in the residuary estate. Having come to this conclusion I am relieved from considering the further point which was argued—namely, that on the construction of Clauses 5 to 8 of the will the trustees were given express power to retain the testator's real estate unconverted throughout the trust. This argument in my opinion raises points of considerable difficulty and I express no opinion upon it.

The summons also asks whether the trustees have power to appropriate the ordinary shares which the testator held in Thomas Wragg & Sons, Ltd., at the time of his death. In my judgment there can be no reasonable doubt that they have such power by reason both of the express power to retain any investments which the testator might have at his death contained in Clause 8, and also of the express power to invest in such shares as they in their absolute and uncontrolled discretion should think fit contained in Clause 10, and I hold accordingly.

In the result I propose to make a declaration that upon the true construction of the will of the testator the plaintiff and the defendant Herbert Wragg as trustees of the said will have the power to appropriate (*a*) ordinary shares in Thomas Wragg & Sons, Ltd., and (*b*) real estate of the testator in

(1) [1911] 2 Ch. 442.

or towards satisfaction of the shares of the testator's daughters and deceased son Horace Wragg in the testator's residuary estate.

P. O. LAWRENCE J.

1919

WRAGG, *In re.* WRAGG *v.* PALMER.

Solicitors: *Andrew, Wood, Purves & Sutton, for Dewes & Musson, Ashby-de-la-Zouch; Long & Gardiner.*

H. L. F.

of its meanings "to apply money in the purchase of some property from which interest or profit is expected and which property is purchased in order to be held for the sake of the income which it will yield"; whilst the noun "investment" when used in such a clause may safely be said to include as one of its meanings "the property in the purchase of which the money has been so applied." No doubt in many cases the context in which the word "investments" occurs requires that this word should be confined to investments consisting of stocks shares and securities, but where the word "investments" is used without any such context, or where, as in this case, the instrument in which it occurs expressly provides that the word is not to have any such restricted meaning, I think that it includes real estate purchased as an investment. In a recent case before me, where the value of a freehold dwelling-house was in issue, the expert valuers on each side spoke of the difference between the value of the property if put up for sale subject to an existing lease, in which case they said it would only be bought as an investment and consequently would realize a smaller price, and the value of the same property if put up for sale with vacant possession, in which case it would realize a larger price as it would attract not only investors but also prospective occupiers. Moreover in the judgment of Neville J. in *In re Pope's Contract* (1), the following sentence occurs: "It is obvious that the purchase of this house was authorized and is treated merely as one of the investments that the trustees may make." These instances—if indeed examples are needed—show that in ordinary parlance real estate is spoken of as an investment if bought in order to be held for the sake of the income or profit accruing from it. The expression "investing in house property" is one which every lawyer must frequently have heard, and who could doubt that in such a case the house property purchased is properly described as "an investment"? In the case of *In re Gent & Eason's Contract* (2) it was held by Farwell J. that an express power to vary and transpose investments following upon an investment clause authorizing

(1) [1911] 2 Ch. 442, 446. (2) [1905] 1 Ch. 386.

P. O LAWRENCE J. 1919 WRAGG. *In re.* WRAGG *v.* PALMER.

the purchase of real estate conferred a power of sale over the real estate so purchased, and in *In re Pope's Contract* (1), Neville J. came to a similar conclusion where the power to vary investments was only implied. Whilst these cases do not actually determine the question I have to decide they undoubtedly go to show that the word "investment" is not inapt to describe real estate, at all events in cases where the investment clause expressly authorizes the purchase of real estate.

I have on the whole come to the conclusion that on the true construction of Clause 10 of the testator's will the trustees are authorized to invest the trust moneys in the purchase of real estate, and that consequently they can effect a valid appropriation of the testator's real estate in or towards satisfaction of the settled shares of the testator's daughters in the residuary estate. Having come to this conclusion I am relieved from considering the further point which was argued—namely, that on the construction of Clauses 5 to 8 of the will the trustees were given express power to retain the testator's real estate unconverted throughout the trust. This argument in my opinion raises points of considerable difficulty and I express no opinion upon it.

The summons also asks whether the trustees have power to appropriate the ordinary shares which the testator held in Thomas Wragg & Sons, Ltd., at the time of his death. In my judgment there can be no reasonable doubt that they have such power by reason both of the express power to retain any investments which the testator might have at his death contained in Clause 8, and also of the express power to invest in such shares as they in their absolute and uncontrolled discretion should think fit contained in Clause 10, and I hold accordingly.

In the result I propose to make a declaration that upon the true construction of the will of the testator the plaintiff and the defendant Herbert Wragg as trustees of the said will have the power to appropriate (*a*) ordinary shares in Thomas Wragg & Sons, Ltd., and (*b*) real estate of the testator in

(1) [1911] 2 Ch. 442.

or towards satisfaction of the shares of the testator's daughters and deceased son Horace Wragg in the testator's residuary estate.

P. O. LAWRENCE J. 1919 WRAGG, *In re.* WRAGG *v.* PALMER.

Solicitors: *Andrew, Wood, Purves & Sutton, for Dewes & Musson, Ashby-de-la-Zouch; Long & Gardiner.*

H. L. F.

AKTIENGESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM COMPANY, LIMITED.

C. A. 1919 *April* 29, 30.

[1918 A. 620.]

Patent—Practice—Action for Infringement—Particulars of Breaches—Interrogatories—Interrogatories confined to Breaches specified in Particulars—Rules of Supreme Court, Order LIIIA, *rr.* 13, 16, 21.

In an action for infringement of two patents, one being for a process and the other for an improvement of that process, the plaintiffs, by their particulars of breaches delivered with their statement of claim, alleged, in para. 1, a general user of the patents since the dates of their respective grants, and by para. 2 they gave, as required by r. 13 of Order LIIIA, a particular instance of the type of infringement alleged. In support of their case they delivered three interrogatories, the two first of which were directed to asking the defendants whether they had used the plaintiffs' process as alleged in substance in para. 1 of the particulars. The first interrogatory was directed to the general use of the process described in the first patent and the second interrogatory to the use of the process described in the second patent. The third interrogatory was with regard to the particular instance set out in para. 2 of the particulars. The defendants did not object to the third interrogatory except so far as it asked what was the method used by the defendants, there being no claim in the plaintiffs' specifications for any specific method of application of the process. They, however, objected to the first and second interrogatories on the general ground that in the then state of the pleadings the only instance that the plaintiffs would be allowed to prove at the trial would be that given in para. 2 of the particulars, and that the plaintiffs were, therefore, not entitled to interrogate them in respect of the general allegation in para. 1, but were confined to the particular instance in para. 2:—

Held, that, it being the function of particulars of breaches to point out to a defendant what were the particular acts complained of so that he

C. A.

1919

AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG *v.* LONDON ALUMINIUM COMPANY.

should not be taken by surprise, para. 1 of the particulars being a mere general allegation did not comply with that requirement, and that the first and second interrogatories must therefore be disallowed.

Held, also, that the third interrogatory should be allowed, but subject to the omission of any reference to the method used by the defendants.

Benno Jaffé und Darmstaedter Lanolin Fabrik v. *John Richardson & Co.* (1893) 10 Rep. Pat. Cas. 136; *Saccharin Corporation* v. *Haines, Ward & Co.* (1898) 15 Rep. Pat. Cas. 344; and *Sykes* v. *Howarth* (1879) 12 Ch. D. 826 distinguished.

Decision of Sargant J. reversed.

APPEAL from a decision of Sargant J.

The plaintiffs, a Swiss company carrying on business in Zürich, Switzerland, were the registered legal owners of letters patent No. 24,096 of 1907 for an invention entitled "Improvements in Welding Aluminium" and of letters patent No. 24,283* of 1907 for an invention entitled "Improvement in Melting Objects of Aluminium."

In July, 1918, they commenced the present action against the defendants for infringement of their two patents, alleging by para. 5 of their statement of claim that "The defendants have infringed and threaten and intend to infringe the said letters patent and each of them in manner appearing in the particulars of breaches delivered herewith." The particulars of breaches were as follows:—

"1. Prior to the issue of the writ in this action and subsequent to the 17th day of November, 1909, the defendants have infringed each of the letters patent referred to in the statement of claim by the use in this country for welding objects made of aluminium of fluxes made in accordance with the descriptions in the complete specifications of each of the said letters patent and as claimed in all the claiming clauses thereof, and have in this country used the processes therein described, and sold, supplied, and offered to sell objects made of aluminium so welded.

"2. In particular the plaintiffs complain of the use of the flux by the defendants at some time between the 11th and 15th days of January, 1918, inclusive, in welding a lid of aluminium to a saucepan made of aluminium, and the supply on or about the said 15th day of January, 1918, of such saucepan and lid so welded together to Mr. A. Green, of 'Edwinal,'

Ramsbury Road, St. Albans. The said saucepan and lid can be inspected at the offices of the plaintiffs' solicitors.

"3. The precise number, dates, and amounts of the defendants' infringements are not at present known to the plaintiffs, but the plaintiffs claim to recover in respect of all such infringements."

In April, 1919, the plaintiffs applied for leave to deliver interrogatories in support of their case, and by an order dated April 2, 1919, Sargant J. ordered that the plaintiffs should be at liberty to deliver to the defendants in writing the interrogatories set forth in the schedule to the order, and that the defendants, by their proper officer, should, within ten days after service upon them of the order, file an affidavit in answer to such interrogatories. The interrogatories set forth in the schedule were the following:—

"1. Have not the defendants since the 18th day of July, 1912, autogenously welded together pieces of aluminium, using in such welding operation a flux or fluxes containing a mixture of alkali chlorides? If yea, what, if any, material addition was made to such mixture? And what was the method employed for such welding operation?

"2. Have not the defendants, since the 18th day of July, 1912, autogenously welded together pieces of aluminium, using in such welding operation a flux or fluxes containing a mixture of alkali chlorides or alkali chlorides and fluorides? If yea, what was the composition of such flux or fluxes? And what was the method employed for such welding operation?

"3. Did not the defendants, in or about the middle of January, 1918, or some other and what time, weld together the lid and saucepan which may be inspected at the offices of the plaintiffs' solicitors? In such welding operation, did not the defendants make use of a flux or fluxes consisting of a mixture containing a mixture of alkali chlorides or alkali chlorides and fluorides? If yea, what was the composition of such flux, and what was the method employed for such welding operation?"

From this order the defendants appealed, and by their notice of appeal asked that the order might be varied by disallowing and striking out from the schedule thereto the first and second

C. A. 1919

AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG v. LONDON ALUMINIUM COMPANY.

interrogatories and so much of the third interrogatory as asked the defendants to state "the composition of such flux" and the method employed for such welding operation.

J. Hunter Gray K.C. and *J. Whitehead* for the appellants. The appellants object to answer the first and second interrogatories. The first interrogatory is not directed to any allegation in the particulars. The second interrogatory is directed to the second patent and is not relevant to either of the claims in either of the patents. Interrogatories must be relevant to some issue in the action. The only issue in the present state of the pleadings that could be tried is that referred to in para. 2 of the particulars. If para. 2 were proved the fullest discovery would then be given. Paragraph 1 of the particulars is a mere general allegation of infringement and para. 2 gives one specific instance of alleged infringement. It is admitted that there is nothing to prevent the plaintiffs amending their particulars of breaches before trial. If they know of another breach they can amend their particulars by including it and the particulars so amended would be the issues in the action. But they are not entitled to insert a fictitious breach in their particulars and then fish for a real case by administering interrogatories. The Court must look at the pleadings as they stand and there is only one issue to be tried. The principles on which interrogatories should be allowed are stated in *Gourley* v. *Plimsoll.* (1) The practice is to allow discovery only as to the specific instances alleged. Interrogatories are on the same footing as discovery generally. *Benno Jaffé und Darmstaedter Lanolin Fabrik* v. *John Richardson & Co.* (2) and *Saccharin Corporation* v. *Haines, Ward & Co.* (3) upon which Sargant J. relied, do not assist the Court. They laid down no principle. Neither has any bearing on the point which the Court has here to decide. It is submitted therefore that the first and second interrogatories are inadmissible and ought to be disallowed.

Colefax K.C. and *Courtney Terrell* for the respondents. The

(1) (1873) L. R. 8 C. P. 362, 372. (2) 10 Rep. Pat. Cas. 136.
(3) 15 Rep. Pat. Cas. 344.

order of Sargant J. was right. There is no authority for the practice contended for by the appellants. The object of Order LIIIA, r. 16, is that when a defendant comes to trial with experts he shall know what are the issues with which he has to deal. The Court has ample powers to protect the defendants against any disclosure of a secret process. The question is whether the plaintiffs are to be confined to the only breach specified in their particulars. The particulars are particulars in support of para. 5 of the statement of claim. It is admitted that if the plaintiffs went to trial on the pleadings as they now stand they would be confined to para. 2 of their particulars. The defendants are not seeking to interrogate the defendants as to what flux they used. The interrogatories are not fishing. It is admitted that the question whether or not discovery will be allowed is one for the discretion of the Court and that the issues should be settled before the plaintiffs come to trial. There is nothing to prevent a plaintiff supplementing the instances of infringement given in his particulars. In *Benno Jaffé und Darmstaedter Lanolin Fabrik* v. *John Richardson & Co.* (1) there was a general allegation of infringement and a series of interrogatories was allowed, not limited to the particular case alleged of a sale to one Riches. The case is not strictly in point as it did not amount to a decision on the question now before the Court. In *Saccharin Corporation* v. *Haines, Ward & Co.* (2) the point was decided. *Gourley* v. *Plimsoll* (3) has really no bearing on this case. It dealt with an entirely different subject-matter. The plaintiffs here have put on record what induced them to launch the action and ought not to be tied down to the particular instance they knew of when they did so. In *Sykes* v. *Howarth* (4) the particulars of breaches alleged various sales between certain dates and particularly to two persons therein named. An answer of the defendant to interrogatories admitted a sale to one Hirst a third party, and it was held that evidence of this transaction was admissible. The Court must not assume against the plaintiffs that these are fishing interrogatories.

(1) 10 Rep. Pat. Cas. 136.
(2) 15 Rep. Pat. Cas. 344.
(3) L. R. 8 C. P. 362.
(4) 12 Ch. D. 826, 830.

C. A. 1919 — AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG v. LONDON ALUMINIUM COMPANY.

The contention that a plaintiff can only interrogate as to the instances mentioned in his particulars is unsupported by any authority. The discovery of documents should disclose any record of infringement. Inspection of process takes the place of discovery in some instances. As to the form of interrogatory in such a case see *Renard* v. *Levinstein.* (1) [*Vidal Dyes Syndicate* v. *Read, Holliday & Sons* (2) was also referred to.]

By the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83), s. 41, it was provided that in actions for infringement of letters patent particulars were to be delivered and that no evidence should be allowed of any infringement not mentioned therein. There has been no alteration in the practice since that Act. Rule 16 of Order LIIIA provides that the particulars "shall give at least one instance of each type of infringement of which complaint is made." It is submitted that the plaintiffs are not limited when they come to trial to the particular instance they have given in their particulars, but that they are limited to the type of which that is an instance given. They must give one instance at least of each type.

In *Talbot* v. *La Roche* (3) the Court refused to compel the plaintiff in his particulars of breaches to specify particularly the persons and occasions, or the particular parts of the specification alleged to have been infringed, although the declaration merely averred an infringement in general terms. That case was cited with approval in *Ledgard* v. *Bull.* (4) The practice of allowing a general allegation of infringement followed by the allegation of a specific instance of the type of act complained of was followed in the Patents, Designs, and Trade Marks Act, 1883 (46 & 47 Vict. c. 57). See *Tilghman's Patent Sand Blast Co.* v. *Wright & Butler, Ld.* (5) *Patent Type-Founding Co.* v. *Richards* (6) was a case in which the plaintiff was not allowed to go outside the type alleged. Under the rules the plaintiff must identify the type by an instance. Here the type of infringement of which the plaintiffs complain is the welding by a flux, and the instance they give is of a welding by a particular flux.

(1) (1864) 10 L. T. 94.
(2) (1911) 28 Rep. Pat. Cas. 323.
(3) (1854) 15 C. B. 310.
(4) (1886) 11 App. Cas. 648.
(5) (1884) 1 Rep. Pat. Cas. 103.
(6) (1860) 2 L. T. 359.

J. Hunter Gray K.C. in reply.

C. A. 1919

AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG v. LONDON ALUMINIUM COMPANY.

SWINFEN EADY M.R. This is the appeal of the defendants, the London Aluminium Company, Ld., from an order of Sargant J. made on April 2 last whereby it was ordered that the plaintiffs be at liberty to deliver to the defendants the interrogatories set forth in the schedule to the order; and then the defendants were ordered by their proper officer to answer the interrogatories. The schedule contains three interrogatories, and the defendants appeal with regard to the first and second, and with regard to the third interrogatory they raise no objection except in respect of the last line of it.

The action is brought for the infringement of two patents of 1907. The earlier patent No. 24,096 is a patent for the use of a particular flux in the welding of aluminium, and the claim is: "In the autogenous union of aluminium the use of a flux consisting of a mixture of alkali chlorides." The patent does not claim any particular process; indeed the patentee says: "Except that the nature of this solvent and deoxidizing flux is different, the manipulations for welding may be almost exactly like those used for welding lead or iron"; and no suggestion has been made that the patent is for anything beyond the use of a particular flux of alkali chlorides in the process of welding aluminium. The second patent No. 24,283* is for what may be called an improvement in the process. Instead of the flux consisting only of alkali chlorides, the flux in the second specification consists of alkali chlorides and "fluorides of the nature described." Two fluorides are mentioned, fluoride of calcium and fluoride of potassium. It may be that "fluorides of the nature described" would extend to and include certain other fluorides, but the improvement is for combining the fluorides of the nature described with the alkali chlorides as a flux for the welding of aluminium.

The two patents were apparently the subject of some previous litigation which has come to an end, but the present action was not commenced until July 18, 1918.

The plaintiffs in their statement of claim allege infringement of both patents, and then, as required by the rules, they have

C. A. 1919 AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG v. LONDON ALUMINIUM COMPANY. Swinfen Eady M.R.

delivered particulars of the breaches. The plaintiffs rely upon paras. 1 and 2 of these particulars. In a patent action it is essential to deliver particulars of breaches with the statement of claim. Order LIIIA, r. 13, provides that "In an action for infringement of a patent the plaintiff must deliver with his statement of claim particulars of the breaches relied upon"; and r. 16 says "Particulars of breaches shall specify which of the claims in the specification of the patent sued upon are alleged to be infringed and shall give at least one instance of each type of infringement of which complaint is made." Then r. 21 provides: "At the hearing of any action petition or counterclaim relating to a patent, no evidence shall, except by leave of the Court (to be given upon such terms as to the Court may seem just) be admitted in proof of any alleged infringement or objection not raised in the particulars of breaches or objections respectively."

The plaintiffs by para. 2 of their particulars of breaches do give particulars of an alleged infringement. [His Lordship read the paragraph and continued:] In my opinion that is the only particular contained in the document headed "Particulars of Breaches." Paragraph 1 is merely a general allegation that the defendants have infringed the patents, and does not condescend to give any detail, or any particular of the breach. It must be remembered that the function of particulars of breaches is to point out to the defendant what specific act on his part is complained of so as to prevent surprise at the trial; and, if this is so, how can it be said that para. 1 of the plaintiffs' particulars of breaches complies with that provision? It is a mere repetition in general terms of the allegation in the statement of claim that the defendants have infringed the patents "prior to the issue of the writ in this action and subsequent to the 17th day of November, 1909"—that is to say at some time between November 17, 1909, and July 18, 1918, an interval of something like nine years. [His Lordship read the paragraph and continued:] There are no particulars and no details at all. In my opinion that paragraph does not amount to a particular of any breach whatever.

Upon the record as it stands, and upon the action going to trial with the pleadings as they now stand, the only particular given is that of the lid welded to the saucepan between January 11 and 15, 1918; and having regard to r. 21 at the hearing of the action no evidence would be admitted in proof of any alleged infringement not raised in the particulars of breaches. The third interrogatory which in the main is not objected to has reference to the breach described in para. 2 of the particulars. The first and second interrogatories are general interrogatories of a roving or fishing character to endeavour to find out whether the defendants have committed some other breach. They are not directed to any breach of which any particulars are given; and in my opinion it is not the practice in a patent action to allow interrogatories to travel outside the particulars, and to embrace questions generally of a roving and fishing character.

The plaintiffs referred to two authorities as supporting their claim to be allowed the two interrogatories. One was the case of *Benno Jaffé und Darmstaedter Lanolin Fabrik* v. *John Richardson & Co.* (1) In that case there was a particular article manufactured which it was complained was an infringement of the plaintiffs' patent, and interrogatories were delivered. The only objection taken to answering the interrogatories was that the validity of the patent had not yet been established. It was held that the issues of validity and infringement were both to be tried at the hearing of the action, and that it was not a valid objection to answering the interrogatories that the validity of the patent had not yet been established. The other case referred to was one of the Saccharin cases: *Saccharin Corporation* v. *Haines, Ward & Co.* (2) In that case the plaintiffs complained of the sale of a particular compound by the defendants, a compound which the defendants described as Saccharin 1 : 500 and 1 : 300. What the plaintiffs required to know was who were the persons from whom the compound sold by the defendants was obtained, in order that they might prove the process by which the saccharin in question was manufactured. It did not appear

(1) 10 Rep. Pat. Cas. 136 (2) 15 Rep. Pat. Cas. 344.

C. A. 1919

AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG v. LONDON ALUMINIUM COMPANY.

Swinfen Eady M.R.

that the specific article complained of was manufactured in this country; and the whole object of the interrogatory was to enable the plaintiffs to trace the person from whom the defendants obtained it, in order that they might prove the process by which that particular saccharin was manufactured. Neither of those cases supports the contention of the plaintiffs in the present case.

Then it was said that, if the plaintiffs were able to obtain an answer to the interrogatories in the present case, it was quite possible that the answer might disclose some other breaches, and that then the plaintiffs could apply to amend their particulars of breaches, and bring them into the action by amendment. For that the case of *Sykes* v. *Howarth* (1) was relied upon; but it really only comes to this: that, if a plaintiff alleges, as an instance of a breach, a sale to A. and the defendant admits the sale of an article, exactly similar, to B. then the sale to B. will be admissible in evidence. In the particular case the defendant seems to have voluntarily admitted a sale not only to Samuel Shaw & Co. and Charles Smith, in the particulars of breaches mentioned, but also to "other persons"; so that there was an admission that he had sold to other persons an exactly similar article, and then the name of one of them was mentioned.

In my opinion those authorities are no justification for allowing the interrogatories to travel outside the particulars, and by interrogatories of a sweeping character to endeavour to find out whether any further breach has, at any time and under any circumstances, been committed by the defendants.

The third interrogatory itself is, in my opinion, too wide. The earlier part of it is not objected to. [His Lordship read the interrogatory down to the words "If yea, what was the composition of such flux?" and continued:] That, in my opinion, covers all that the plaintiffs are entitled to. It deals with the only instance of a breach that the plaintiffs have given. It raises directly the question whether either or both of the fluxes comprised in the specifications were used by the defendants, and, if they were, it asks the composition of the

(1) 12 Ch. D. 826.

flux actually used. Then the interrogatory as allowed goes on with this: "and what was the method employed for such welding operation?" That I think travels outside the patents altogether. There is no particular method claimed in either of the patents, and it may well be that there are some processes employed by the defendants, the knowledge of which they are desirous of keeping to themselves. In my opinion the plaintiffs are not entitled to ask them what was the method employed for welding; the method has nothing to do with it at all: it is the particular fluxes, and those only, that are claimed by the specifications.

The third interrogatory ought to be allowed down to the words "If yea, what was the composition of such flux?" But the other two which are roving interrogatories ought not to be allowed—certainly not at the present stage of the action. It must be remembered that the discovery given previous to the trial of a patent action does not proceed upon the same lines as discovery after the plaintiff has succeeded in his action and established the validity of his patent and its infringement. Then discovery of a much wider character is given. At present I am only dealing with the case upon the footing of an action for trial in which the claim of the plaintiffs is limited by the particulars of breaches that they have given.

In my opinion the appeal ought to be allowed and the third interrogatory as altered alone sanctioned.

WARRINGTON L.J. I am of the same opinion. The two interrogatories which are complained of are founded apparently on the first paragraph of the particulars of breaches; and the real question to my mind is whether that paragraph sufficiently alleges a particular breach, so as to raise an issue for trial at the hearing of the action. If it does raise such an issue, then the plaintiffs, being entitled to give evidence in support of their case upon it, would be entitled to obtain by means of an interrogatory either an admission or a denial from the defendants as the case may be with reference to it. If not then in my opinion upon the pleadings as they stand, and it is those only that we have to consider, the plaintiffs

C. A. 1919 — AKTIEN-GESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG v. LONDON ALUMINIUM COMPANY. — Warrington L.J.

would not be entitled either to adduce evidence at the trial or to obtain information by means of an interrogatory with regard to it.

I turn to para. 1 of the particulars of breaches with a view to seeing whether it does comply with the requirements of the rules in reference to that matter. The material rules are rr. 13, 16, and 21 of Order LIIIA. Rule 13 in general terms requires the plaintiff to deliver with his statement of claim particulars of the breaches he relies upon. Rule 16 specifies two things which at all events the particulars must express, first, the claims of the specification said to be infringed, and, secondly, at least one instance of infringement. Rule 21 is the consequential rule limiting the right of the plaintiff to adduce evidence in support of the particular breaches.

Paragraph 1 of the particulars of breaches here is in my opinion no particular at all. It is true that it complies with r. 16 to the extent of stating that the defendants have infringed the claims of both the specifications, there being only one claim in each, but except for that it gives no particulars at all. It condescends to no date and no place, to nothing except a general allegation in expanded terms that the defendants have infringed the plaintiffs' patents. Just put oneself in the position of a defendant coming to trial on such an allegation. He has no information at all, and it would be quite impossible for him to meet and deal with some instance of which the plaintiff might adduce evidence. He would have no information which would enable him to prepare his witnesses for meeting any case which the plaintiffs might make. It seems to me, therefore, that para. 1 of the particulars of breaches is wholly insufficient.

It has been suggested, and it is true, that para. 1 does comply with r. 16 by specifying the claim which is said to be infringed; but in my opinion r. 16 does not limit the generality of the obligation imposed upon the plaintiff by r. 13. It only specifies two things which at all events must be stated. The plaintiff is still under the obligation imposed by r. 13 to give the defendant such information as will enable him to know the case which is going to be made against him at the trial.

With regard to the two cases which have been cited, in my judgment when they are carefully considered they do not help the plaintiff in the least. To take first of all the *Benno Jaffé Case*. (1) There the particulars of breaches stated that the defendants had in particular sold to one Riches an article called "Anaspoline," and that the manufacture and sale of such article was an infringement of the plaintiffs' patent. The interrogatories it was sought to administer in that case are found when carefully looked at to refer wholly and exclusively to that article. Each interrogatory asks what the defendants have done "in the manufacture aforesaid," going through the items in the specification and asking whether in the manufacture aforesaid the defendants have not availed themselves of the matters so described; and the only objection taken by the defendants to answering those interrogatories was that they ought not to be answered until the validity of the patent had been established. That was the real point to be decided there. In my opinion the particulars in that case were ample, the interrogatories were founded upon those particulars, and there was, as was tacitly recognized by the counsel for the defendants, no possible objection to those interrogatories except the one which it was sought to take.

The *Saccharin Case* (2) also was a case in which there was a sufficient particular of a breach. The particular was that the defendants had infringed, by selling, etc., certain compounds sold by the defendants under the name of Saccharin 1 : 500 and 1 : 300, those figures representing the strengths of the compound. The only point in the interrogatory to which the judgment of the Court was directed, and as to which the interrogatory was ultimately allowed, was the question at the end of it asking from whom were the compounds sold by the defendants obtained, if they were obtained abroad. At first sight, as was recognized by all the members of the Court, that interrogatory was inadmissible; but, to paraphrase the words of the report in the argument of Mr. Moulton, the plaintiffs said they could not say which

(1) 10 Rep. Pat. Cas. 136. (2) 15 Rep. Pat. Cas. 344.

C. A. 1919 AKTIEN-GESELL-SCHAFT FÜR AUTOGENE ALUMINIUM SCHWEIS-SUNG v. LONDON ALUMINIUM COMPANY. Warrington L.J.

patent of their numerous patents was infringed until they knew from whom the defendants obtained the stuff which they were selling. That was the whole point. The plaintiffs were entitled to a number of patents in this country. They were not entitled in foreign countries to protection in respect of all the processes so patented; but, if they could find out from whom that stuff which was being sold by the defendants came, they would know its nature, and then they would know under which of their patents they would have to make their case against the defendants. It was on that ground, and that ground alone, that the interrogatory, which prima facie would have been inadmissible, was allowed. It seems to me that neither of those cases supports any interrogatory even faintly resembling those objected to in the present case.

With regard to the third interrogatory, I have only to say that I agree that the method used is entirely irrelevant in the present action. There is no mention in the patents of any particular method being claimed by the plaintiffs, and the effect of the defendants being compelled to answer a question as to method might be that they would be required to disclose something the concealment of which might be extremely material to them, and the disclosure of which would be irrelevant to any issue raised in the action.

I agree that the first and second interrogatories ought to be disallowed, and that the third interrogatory ought to be allowed, but with the omission of the question as to method.

Appeal allowed.

Solicitors for the appellants: *Ward, Bowie & Co.*
Solicitors for the respondents: *Bristows, Cooke & Carpmael.*

W. I. C.

In re BRITISH CONSOLIDATED OIL CORPORATION, LIMITED.

HOWELL *v.* THE COMPANY.

PETERSON J.

1919

March 18.

[1911 B. 3717.]

Company—Debenture Stock—Trust Deed—Remuneration of Trustees—Contract—Construction—Appointment of Receiver—Right of Trustees to subsequent Remuneration.

A trust deed to secure an issue of second debenture stock empowered the trustees at any time after the security thereby constituted became enforceable to appoint a receiver at a remuneration, and to delegate their powers to him, and also to apply to the Court for the execution of the trusts of the deed or assent to or approve of any such application at the suit of one of the debenture holders. The next succeeding clause in the deed provided that in each and every year during the continuance of the security the company should pay to each of the trustees as and by way of remuneration for his services as trustee a sum computed at the rate of one hundred guineas per annum.

Upon default by the company a receiver was appointed at the instance of the first debenture stockholders, who were ultimately paid off, and the balance of the proceeds of realization was paid into court:—

Held, that the remuneration to the trustees of the above-mentioned deed was in no way conditional upon proof by them that they had rendered substantial, or any, services in each year, but that upon the true construction of the contract under which they accepted office, they were entitled whether their duties were onerous or light, and notwithstanding the appointment of a receiver, to receive the stipulated remuneration until the security came to an end.

In re South Western of Venezuela (Barquisimeto) Rly. Co. [1902] 1 Ch. 701 and *In re Piccadilly Hotel, Ld.* [1911] 2 Ch. 534 applied.

In re Locke & Smith Ld. [1914] 1 Ch. 687 not followed.

ADJOURNED SUMMONS.

This was an application made by the trustees for second debenture holders in an action commenced on behalf of the holders of first mortgage debentures in the above-mentioned company on November 9, 1911, and in which a receiver of the company's assets had been appointed on November 17, 1911. The property of the company had since been realized and the balance of the proceeds of realization after payment of the first mortgage debentures had been paid into court. The applicants, who had been made defendants in that action,

PETERSON J. 1919 BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re.* HOWELL *v.* THE COMPANY.

were the trustees of a trust deed dated July 11, 1911, for securing the second mortgage debenture issue of 7*l.* per cent. redeemable debenture stock to the total amount of 400,000*l.* They had received no remuneration whatever under their trust deed, and they now claimed that under the provisions of that deed the sum of 1470*l.* was due to them in respect of remuneration.

By clause 7 of the deed the company charged in favour of the trustees (subject to the first mortgage debentures) all its assets for the time being, both present and future, and the undertaking of the company including its uncalled capital with the payment to the trustees of the principal moneys of the stock and the interest thereon by way of a floating security.

By clause 8 the trustees were to permit the company to hold and enjoy all the mortgaged premises and to carry on therein and therewith the business of the company, and to deal with and dispose of them (otherwise than by mortgage or charge) in the ordinary course of business until the security thereby constituted became enforceable as thereinafter provided and at any time after the same became enforceable the trustees were empowered in their discretion, and were required upon the request in writing of the holders of one-fourth of the stock to enter upon or take possession of the mortgaged premises or any of them, and to sell and convert into money or manage or deal with the same or any part thereof as they should think fit. The power of and trust for sale thus conferred were thereinafter referred to as "the primary trust for conversion."

Clause 9 provided that the security thereby constituted should become enforceable in certain specified events, one or more of which had happened.

The other material clauses of the trust deed provided as follows:—

Clause 13: "The trustees shall hold the moneys to arise from any sale calling in collection or conversion under the provisions hereinbefore contained upon trust that they shall thereout in the first place pay or retain the costs and expenses incurred in or about the execution of such trust or otherwise

in relation to these presents and all remuneration due to them and all other moneys payable hereunder to them or to any agent manager receiver or other person appointed by them or acting on their behalf and shall apply the residue of such moneys" in payment of arrears of interest and all principal moneys as therein mentioned.

Clause 20: "At any time after the security hereby constituted becomes enforceable the trustees may by writing appoint a receiver of the mortgaged premises or any part thereof and remove any receiver so appointed and appoint another in his stead, and the following provisions shall have effect:—

(*a*) Such appointment may be made either before or after the trustees shall have entered into or taken possession of the mortgaged premises or any part thereof:

(*b*) Such receiver may be invested by the trustees with such of their powers and discretions as the trustees may think expedient:

(*c*) Unless otherwise directed by the trustees such receiver may exercise all the powers and authorities vested in the trustees by clause 8 hereof when the security has become enforceable:

(*d*) Such receiver shall in the exercise of his powers authorities and discretions conform to the regulations from time to time made and given to the trustees:

(*e*) The trustees may from time to time fix the remuneration of such receiver and direct payment thereof out of the mortgaged premises:

(*f*) . . . .

(*g*) Save so far as otherwise directed by the trustees all moneys from time to time received by such receiver shall be paid over to the trustees to be held by them on the trusts declared concerning the moneys resulting from the primary trust for conversion:

(*h*) . . . ."

Clause 25: "The trustees may at any time after the security hereby constituted becomes enforceable apply to the Court for an order that the trusts and provisions hereof be carried into execution under the direction of the Court, and

PETERSON J.
1919
BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re.*
HOWELL *v.* THE COMPANY.

for the appointment of a receiver or receiver and manager of the mortgaged premises or any of them and for any other order in relation to the administration of the trusts hereof as the trustees shall deem expedient and they may assent to or approve of any application to the Court made at the instance of any of the debenture holders and shall be indemnified by the Company against all costs charges and expenses incurred by and in relation to any such application or proceedings."

Clause 26: "The Company shall in each and every year during the continuance of this security pay to each of the trustees as and by way of remuneration for his services as trustee a sum computed at the rate of one hundred guineas per annum as from the date thereof. Provided that should the whole of the stock be exchanged for shares under the conditions mentioned in the first schedule hereto then such remuneration shall cease and the Company shall pay to the trustees a sum equal to one year's remuneration calculated at the amount payable at the time when such exchange shall be completed. The foregoing annual remuneration shall accrue from day to day and be payable half-yearly and shall be in addition to all travelling and other costs charges and expenses which they may incur in relation to the execution of the trusts and powers hereby reposed in the trustees. Such remuneration costs charges and expenses shall be a charge upon the premises in priority to the stock and the interest thereon. . . . ."

There was evidence that the applicants had rendered services as trustees since the appointment of the receiver, but further mention of it is not material inasmuch as their claim was decided solely upon the construction of the trust deed.

Tomlin K.C. and Morgan May (*for J. E. C. Adams serving with H.M. Forces*) for the applicant trustees.

On the construction of this trust deed, the trustees are entitled to their remuneration. The deed specifies a fixed remuneration for their services and there is nothing which

correlates them, or suggests payment on a quantum meruit basis. The trustees accepted office under this contract which does not make their remuneration depend on services, and even if by reason of the appointment of a receiver under clause 20 they have less to do, that would not diminish the amount they are to be paid: *In re South Western of Venezuela (Barquisimeto) Rly. Co.* (1) So long as all goes well with the company, the duties of trustees for debenture holders must of necessity be of a passive nature—e.g., allowing the property to remain vested in them, keeping the deeds and so on. Their activity begins only when the company makes default and then, when a receiver is appointed and they are put to much more trouble, it is illogical to say, as was said in *In re Locke & Smith, Ld.* (2), that they are not to be paid for it. In that case, as well as in this, both quantum and period were fixed by the trust deed, and that is enough to establish the claim of the trustees. It was also the case in *In re Anglo-Canadian Lands* (1912), *Ld.* (3), and was the ground of the decision in *In re Piccadilly Hotel, Ld.* (4), where Swinfen Eady J. pointed out that the question of quantum and period dealt with by Chitty J. in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (5), did not arise.

Further, apart from the question of the construction of the deed, the evidence shows that the trustees have rendered considerable services since the appointment of a receiver, and on that ground also they are entitled to their remuneration.

Hughes K.C. and J. F. W. Galbraith for the respondent debenture holders. The trustees under this particular deed are not entitled unconditionally to their remuneration; there is no practical difference between this clause and that in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (5) Up to the appointment of a receiver the trustees are entitled to be paid for their services which, no doubt, are not onerous, but when once the receiver was appointed by the Court that put an end to their services contemplated by the trust deed

(1) [1902] 1 Ch. 701, 705.
(2) [1914] 1 Ch. 687.
(3) [1918] 2 Ch. 287.
(4) [1911] 2 Ch. 534.
(5) April 25, 1895. Unreported, but mentioned in Palmer's Company Precedents, 10th ed., Part III., p. 737.

PETERSON J.

1919

BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re.*

HOWELL *v.* THE COMPANY.

and to their duties and remuneration. It would be straining the provisions of clause 13 to say that remuneration was payable both to the trustees and the receiver: *In re Locke & Smith, Ld.* (1); *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (2) The result of the authorities seems to be that for remuneration to be payable services must be rendered. In *In re Anglo-Canadian Lands* (1912), *Ltd.* (3), the words "for their services" were not in the deed, and their absence formed the foundation of the distinction made in the judgment.

[PETERSON J. The result of your contention would be that if in any year the trustees had rendered no services, they would receive no remuneration for that year. In reality the activity of the trustees increases upon the appointment of a receiver.]

After the appointment of a receiver the anxieties of the trustees are at an end. The evidence of services in this case is very vague and unsatisfactory, and were at best only similar to those in *In re Locke & Smith, Ld.* (1) We submit that the trustees are not entitled to their remuneration on either ground.

Tomlin K.C. in reply.

PETERSON J. In this case the applicants were appointed trustees of a trust deed, dated July 11, 1911, for securing second debenture stock of the British Consolidated Oil Corporation, Ld. The holders of the first mortgage debentures commenced the present action for the execution of the trusts of the trust deed securing their debentures and made the trustees for the second debenture stockholders defendants. A receiver was appointed. The holders of the first mortgage debentures have been paid off and the balance of the proceeds of realization of the company's property has been paid into court. The question now is whether the trustees for the second debenture stockholders are entitled to remuneration under the provisions of their trust deed for the period which has elapsed since the appointment of the receiver at the instance of the first

(1) [1914] 1 Ch. 687. (2) April 25, 1895. Unreported.
(3) [1918] 2 Ch. 287.

debenture holders. In my opinion the answer to that question depends upon the true construction of the trust deed.

The trust deed contains the usual clauses charging in favour of the trustees all the undertaking of the company with payment to the trustees of principal money and interest, and (clause 8) directing the trustees to permit the company to hold and enjoy all the mortgaged premises and to carry on the authorized business of the company until the security shall become enforceable. There is power, and in one event a trust, for the trustees to enter upon and take possession of the mortgaged premises at any time after the security becomes enforceable, and to sell and convert the same or any part thereof. Clause 13 provides that: The trustees shall hold the proceeds of conversion upon trust to pay or retain the costs and expenses incurred in or about the execution of the trust, "and all remuneration due to them and all other moneys payable hereunder to them or to any agent manager receiver or other person appointed by them or acting on their behalf."

By clause 20 the trustees are given power at any time after the security has become enforceable to appoint a receiver of the mortgaged premises and remove any receiver so appointed, and on the appointment of a receiver he may be invested by the trustees with such of their powers and discretions as the trustees think expedient, and unless otherwise directed by them he may exercise all the powers and authorities vested in them by clause 8; and there is a sub-clause which provides that the receiver shall in the exercise of his powers authorities and discretions conform to the regulations from time to time made and given by the trustees. By other sub-clauses the trustees are authorized from time to time to fix the remuneration of the receiver to direct payment thereof out of the mortgaged premises, and to require any such receiver to give security for the due performance of his duties, and, save so far as otherwise directed by the trustees, all moneys received by the receiver are to be paid over to the trustees to be held by them on the trusts declared concerning the proceeds of sale of the mortgaged premises.

PETERSON J. 1919 BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re.* HOWELL *v.* THE COMPANY.

By the trust deed, therefore, the trustees are given express power to appoint a receiver and to delegate to him such of their functions as they think fit, and they are authorized to fix his remuneration and direct payment of it out of the mortgaged premises. These provisions relate to the time when the security has become enforceable but before any litigation has ensued. Clause 25 however provides that the trustees may at any time after the security has become enforceable apply to the Court for the execution of the trusts and provisions of the trust deed and for the appointment of a receiver, and also may assent to or approve of any application to the Court made at the instance of any of the debenture holders.

Clause 26 provides that "the company shall in each and every year during the continuance of this security pay to each of the trustees as and by way of remuneration for his services as trustee a sum computed at the rate of one hundred guineas per annum as from the date thereof," and then there is a proviso that if "the whole of the stock be exchanged for shares under the conditions mentioned in the First Schedule hereto then such remuneration shall cease and the company shall pay to the trustees a sum equal to one year's remuneration calculated at the amount payable at the time when such exchange shall be completed." The clause also provides that "the foregoing annual remuneration shall accrue from day to day and be payable half-yearly and shall be in addition to all travelling and other costs charges and expenses which they may incur in relation to the execution of the trusts and powers hereby reposed in the trustees. Such remuneration costs charges and expenses shall be a charge upon the premises in priority to the stock and interest thereon."

I should have thought that this was a contract under which the trustees accepted the position of trustees on the terms that they were paid the remuneration during the continuance of the security, that is, so long as the security remained vested in the trustees and the moneys secured by the deed remained owing. Both parties recognized that the trustees might have much or little to do, but whatever they might have to do,

they were to receive the remuneration each year so long as they continued to be trustees and the stockholders had not been paid off. The trust deed did not provide that they were only to receive the remuneration each year on condition that they were to perform active services in that year. The services for which they were to be remunerated were occupation of the position of trustees and the performance of such duties as that position entailed.

There are, however, several authorities on this question. The first is *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (1), reported only in Sir Francis Palmer's volume on Debentures, 10th ed., p. 737. The note of this case indicates that there had been an action for the execution of the trusts and the appointment of a receiver. According to the note, the trustees were to be paid a salary as remuneration for their services. The learned judge held that the services which they alleged they had rendered were not those contemplated by the trust deed. The note, however, does not show what was the period during which the remuneration was to be payable, and I gather that the learned judge came to the conclusion that, in the absence of any defined period during which they were to be paid, the remuneration was only payable up to the time at which the receiver was appointed in the debenture holders' action.

In *In re Locke & Smith, Ld.* (2), which came before Eve J., the trust deed contained a provision under which the trustees were to hold the moneys to arise under the primary trust for conversion upon trust to pay the costs and expenses incurred in the execution of the trust, including their own remuneration. A further clause provided that the company should in every year during the continuance of the security pay to the trustees for the time being of the deed as and by way of remuneration for their services as trustees the sum of 105*l.* Clause 40 of the deed empowered the trustees to employ and pay an agent, whether being a solicitor or other person, to transact all business and do all acts required to be done in the trust, and the next clause provided that the trustees and every

(1) April 25, 1895. Unreported. (2) [1914] 1 Ch. 687.

PETERSON J. 1919 BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re.* HOWELL *v.* THE COMPANY.

receiver, attorney, manager, agent or other person appointed by the trustees thereunder should be entitled to be indemnified out of the mortgaged premises in respect of all liabilities and expenses incurred by them in the execution or purported execution of the trusts thereof, or of any powers, authorities, or discretions vested in them pursuant to those presents. The learned judge came to the conclusion that under that deed and in the circumstances of that case the remuneration payable to the trustees came to an end when the receiver was appointed. The learned judge held that unless the trustees could show that after the appointment of a receiver they had rendered substantial services, their remuneration was not payable. But if after the appointment of a receiver the substantiality of their services is to be weighed, it is not easy to see why it is not necessary during the years preceding the appointment of a receiver to inquire whether their services were substantial. If after the appointment of a receiver the trustees are entitled to their remuneration if they prove that they have rendered substantial services, it must be because the contract so provides; and in that case it would seem to be necessary to inquire into the substantiality of their services at any time which is covered by the contract.

In *In re South Western of Venezuela (Barquisimeto) Rly. Co.* (1) the articles of association provided that the remuneration of the directors should be at the rate of 1000*l.* a year, to be divided amongst them as they should agree. In a debenture-holders' action two of the directors were appointed to be receivers and managers of the company's assets and business, and the Court allowed them a remuneration for so acting. Buckley J. decided that the fact that the two directors were remunerated as receivers and managers did not prevent them from receiving also their remuneration as directors. Buckley J. said: "The directors are entitled to their 1000*l.* a year as the payment to be made to them for doing that which for the time being they have to do as directors of the company. If, by reason of the appointment of receivers and managers, the directors have less to do, that, in my judgment, does not in

(1) [1902] 1 Ch. 701, 705.

any way diminish the amount which they are to be paid as remuneration under the articles. Their obligation as directors is to do whatever there is to be done by them as directors."

The next case, *In re Piccadilly Hotel, Ld.* (1), came before Swinfen Eady J. Clause 34 of that trust deed provided that the company should in each and every year during the continuance of the security pay to the trustees as and by way of remuneration for their services as trustees the sum of 262*l.* 10*s.* per annum, which was to continue payable until the trusts of the deed should be finally wound up and whether or not a receiver should have been appointed or the trusts of the deed should be in course of administration by or under the direction of the Court. The learned judge having had his attention called to *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (2), said: "Clause 34, which fixes the quantum and period of their remuneration, is wide and comprehensive. It cannot be disputed that they are to be paid at the rate of 262*l.* 10*s.* a year, and that their remuneration continues payable notwithstanding the appointment of a receiver until the trusts of their trust deeds are finally wound up. In these circumstances the question of quantum and period dealt with by Chitty J. in *Debenture Corporation, Ld.* v. *Uttoxeter Brewery, Ld.* (2), noted in Palmer's Company Precedents, 10th ed., Part III., p. 737, does not arise in the present case. The language of clause 34 is perfectly clear as to quantum and period. If any question had arisen the observations of Buckley J. in *In re South Western of Venezuela* (*Barquisimeto*) *Rly. Co.* (3) would have been of some assistance." The learned judge in effect held that where the deed provides for the payment of a definite remuneration during a fixed period, the remuneration is payable during the period for which the deed declares that it shall be payable.

In *In re Anglo-Canadian Lands* (1912), *Ld.* (4), which came before me, there was a trust deed which provided that each

(1) [1911] 2 Ch. 534, 542.
(2) April 25, 1895. Unreported.
(3) [1902] 1 Ch. 701.
(4) [1918] 2 Ch. 287.

PETERSON J. 1919 — BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re*. HOWELL *v.* THE COMPANY.

of the trustees should be entitled to receive, by way of remuneration, the yearly sum of 105*l*., and the trustees had power to appoint a receiver of the mortgaged premises in certain specified events. The trustees, in exercise of their power, appointed a receiver, who was subsequently appointed receiver and manager by the Court in a debenture-holders' action. I came to the conclusion in that case, that the trustees took office in consideration of the contract contained in the trust deed, and were entitled to their remuneration notwithstanding the appointment of a receiver.

The result of the cases in my view is that the real question is what is the true construction of the trust deed. In the present deed there are these two outstanding features—the trustees have power to appoint a receiver at a remuneration and delegate their powers to him, and they have an express power under clause 25 to apply to the Court for the execution of the trusts of their trust deed, or they may assent to or approve of any such application at the suit of one of the debenture holders. The next succeeding clause in the trust deed contains the provision for their remuneration in each and every year during the continuance of the security. For my part, I cannot come to any other conclusion than this—that on the true construction of this document the trustees were in fact to be paid their remuneration so long as the security continued, notwithstanding the exercise of the power given to them to appoint a receiver, notwithstanding that they exercised the power given to them by clause 25 to apply to the Court, and notwithstanding the appointment of a receiver by the Court. In these circumstances it seems to me to be inevitable that they should have their remuneration, notwithstanding that a receiver has been appointed by the Court at the instance of the first mortgage debenture stock holders. In my opinion the clause is not one which gives the trustees remuneration only if they can prove that they have done substantial or any work in each year. The trustees have accepted office on the terms, that, whether their duties are onerous or light, they are to be entitled to have the stipulated remuneration until the security comes to an end; and as the security has not

yet come to an end, I am of opinion that they are entitled to their remuneration.

PETERSON J.

1919

BRITISH CONSOLIDATED OIL CORPORATION, LIMITED, *In re.*

HOWELL *v.* THE COMPANY.

Solicitors for applicants : *Vaughan & Williams.*
Solicitors for respondents : *Donald McMillan & Mott.*

R. M.

In re HOLLEBONE.

HOLLEBONE *v.* HOLLEBONE.

[1918 H. 1717.]

EVE J.

1919

April 30; *May* 9.

Will—Residuary Gift—Trust for Conversion—Sale of Testator's Business prior to Death—Payment by Instalments—Partnership—Profits—Apportionment—Tenant for Life and Remainderman—Capital or Income—Mode of Calculation.

In July, 1917, a testator, who was a partner in a firm of stock brokers, joined in a sale of the business and goodwill of the firm, the purchase price being payable in ten half-yearly instalments, each of which was to be a sum equal to a certain percentage of the net commissions earned by the purchasers of the business. The testator died on September 12, 1917, having by his will bequeathed his residuary estate to trustees upon trust for conversion, with power to postpone, and to pay the income to his wife for life, and after her death to divide the estate among his six children. The trustees had received certain sums representing the proportion of the instalments to which the testator's estate was entitled. On a summons by them to ascertain how these and the future instalments ought to be treated as between the tenant for life and those interested in remainder in the corpus of the residuary estate:—

Held, that each instalment of the purchase price of the business already received and thereafter to be received, ought, as from the testator's death, to be apportioned as between capital and income in the manner stated in *Beavan* v. *Beavan* (1869) 24 Ch. D. 649 n., and the tenant for life was entitled to be paid the proportion attributed to income and to receive thereafter the interest earned by the investment of the proportion representing capital.

The principle settled in *Wilkinson* v. *Duncan* (1857) 23 Beav. 469; *Beavan* v. *Beavan*, 24 Ch. D. 649 n.; and *In re Earl of Chesterfield's Trusts* (1883) 24 Ch. D. 643 adopted and followed.

ADJOURNED SUMMONS.

The testator, Henry Hollebone, was the senior partner in the firm of Hollebone Brothers & Trench, of 18, Birchin

EVE J. 1919 HOLLEBONE, *In re.* HOLLEBONE *v.* HOLLEBONE.

Lane, London, stock and share brokers. On July 17, 1917, the testator's firm entered into an agreement with Messrs. J. and A. Scrimgeour for the sale to them of the business and goodwill of Hollebone Brothers & Trench, to be transferred to the purchasers on August 1, 1917, and the purchase price for the business and goodwill to be paid by ten half-yearly instalments, each of which instalments was to be a sum equal to 53 per cent. (less income tax at the current rate for each half year) of the total net commissions which the purchasers should earn during the half year ending January 31 and July 31 in each year, commencing with the half year ending on January 31, 1918, in respect of the business of the vendors' then present clients and any further clients introduced by the vendors, or by their clients. Each such instalment was to be payable one calendar month after the end of the half year to which it related. Should any such payment not be made at or before its due date interest at 5 per cent. per annum was to be paid thereon from that date until actual payment thereof.

The testator died on September 12, 1917, having by his will, dated December 11, 1911, appointed his wife, the defendant Emily Hollebone, and his son, the plaintiff Leslie Harry Hollebone, and another son, Trevor S. Hollebone, executors and trustees, and after certain specific bequests to his wife he devised and bequeathed all his residuary real and personal estate to his trustees upon trust for sale and conversion, with power to postpone such sale and conversion for such a period as his trustees might think proper, "and so that any reversionary interest be not sold until it falls into possession," unless his trustees should see reason for sale. The testator then directed his trustees to stand possessed of his residuary estate upon trust to pay the income thereof to his wife during her life, and upon her decease to divide the same into equal parts or shares in trust for his four sons and two daughters, or their issue, in manner therein mentioned. The testator's estate was valued at 21,290*l.* 7*s.* 10*d.*

In pursuance of the agreement of July 17, 1917, Messrs. J. and A. Scrimgeour paid to the credit of the banking account

of Hollebone Brothers & Trench the sum of 1675*l.* 6*s.* 10*d.* as representing the proportion of the net commissions (less income tax) payable to Hollebone Brothers & Trench for the period from August 1, 1917, to June 30, 1918, and the plaintiff and his co-executor had received the sum of 575*l.* 4*s.* as representing the proportion of the sum of 1675*l.* 6*s.* 10*d.* to which the testator's estate was entitled. The executors subsequently received a further sum of 546*l.* 17*s.* 5*d.*, being the proportion of 1592*l.* 16*s.* 6*d.*, representing the net commissions for the period from June 1, 1918, to December 31, 1918.

The question raised by the plaintiff, as executor, on an originating summons, was whether the instalments of purchase money payable under the agreement of July 17, 1917, ought, as between the tenant for life and the remaindermen under the testator's will, to be treated and applied as capital or income.

J. M. Stone for the executor.

J. G. Wood for the first defendant, the tenant for life. The rule in *In re Earl of Chesterfield's Trusts* (1), which is really the rule laid down in *Beavan* v. *Beavan* (2), should be applied here, so that a sum ascertained by actuarial valuation to be sufficient at 4 per cent. interest to produce the exact amount of the instalment would be capital, and the rest would be income payable to the widow. This is not reversionary property but future payments in respect of property sold. It is a matter of administration, but does not alter the rights inter se of the tenant for life and remaindermen.

J. W. Manning for the remaindermen. All these instalments of purchase money should be treated as corpus and not apportioned as between the tenant for life and the remaindermen. The rule in *In re Earl of Chesterfield's Trusts* (1) does not apply, and has never been extended to a case like the present. The interest only on the corpus is payable to the widow for life. The testator never contemplated an

(1) 24 Ch. D. 643. (2) 24 Ch. D. 649 n.

EVE J. 1919 HOLLEBONE, *In re.* HOLLEBONE *v.* HOLLEBONE.

apportionment of this sort. This is in the nature of a reversionary interest and there was no intention that it should be sold. There should be no apportionment of the profits: *Ibbotson* v. *Elam*. (1)

Cur. adv. vult.

May 9. EVE J. (after stating the facts, continued:) This summons has been issued for the purpose of having it determined how the amounts already received in respect of the period subsequent to the testator's death and the instalments hereafter to be received ought to be treated as between the widow and those interested in the corpus of the residuary estate. On behalf of the latter it has been argued that the instalments are capital and that the only right of the tenant for life is to have the income derived from the investment of each instalment as received; the widow on the other hand contends that each instalment ought to be apportioned as between capital and income, and that she is entitled to be paid the proportion attributed to income and to receive thereafter the interest earned by the investment of the proportion representing capital.

Those entitled in remainder rely to some extent on the direction in the will that reversionary interests are not to be sold until they fall into possession; and on the provision in the sale agreement that unpaid instalments are to bear interest if not paid at the stipulated date. I do not think these considerations really affect the question—the testator's interest cannot, in my opinion, be accurately described as a reversion. Each instalment is a debt of an uncertain amount payable at a future date; nor can the fact that as between vendor and purchaser the latter is bound to pay interest by way of addition to the purchase money if he fail to complete on the due date affect the rights inter se of the parties interested in the purchase price.

It comes, therefore, to this, that part of the outstanding personal estate of the testator is represented by the right to receive these instalments of purchase money of wholly uncertain

(1) (1865) L. R. 1 Eq. 188.

amounts and in the meantime producing no income. The widow is not bound to join in exercising the power to postpone the conversion of the asset, but it is obvious that the amount which could be realized by its immediate conversion is of a very uncertain and speculative character. In these circumstances, it is for the benefit of all parties interested in the corpus of the estate that conversion should be postponed and that the agreement for sale should be worked out, but this result ought not to be allowed to prejudice the tenant for life; and, in my opinion, the case falls within the principle settled in *Wilkinson* v. *Duncan* (1), applied in *Beavan* v. *Beavan* (2), and followed in *In re Earl of Chesterfield's Trusts.* (3) The facts of the present case are not unlike those in *Beavan* v. *Beavan.* (2) There the testator's estate—which was subject to an immediate trust for conversion—was represented in part by arrears of an annuity which had accumulated from the death of the testator in 1852 to August 8, 1865, to the amount of 8656*l.* 10*s.* 7*d.* when they were paid off, and by instalments of the annuity to be received subsequent to August 8, 1865. Lord Romilly decided that the 8656*l.* 10*s.* 7*d.* received on August 8, 1865, ought to be apportioned as on that day between corpus and income by ascertaining the sum which, put out at interest at 4 per cent. per annum on the day of the testator's death and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax, would, with the accumulations of interest, amount on August 8, 1865, to 8656*l.* 10*s.* 7*d.*, and that the sum so ascertained ought to be treated as corpus and the difference as income payable to the tenant for life. And further that each instalment of the annuity with or without interest received after August 8, 1865, or to be thereafter received ought to be apportioned between corpus and income as on the day on which such instalment was or should be received on the same principle on which the 8656*l.* 10*s.* 7*d.* was directed to be apportioned.

In my opinion, in this case, each instalment of purchase

(1) 23 Beav. 469. (2) 24 Ch. D. 649 n.
(3) 24 Ch. D. 643.

EVE J.
1919
HOLLEBONE, *In re.* HOLLEBONE *v.* HOLLEBONE.

money already received and hereafter to be received, with or without interest, ought as from the date of the testator's death to be apportioned between corpus and income by ascertaining the sum which put out at interest at 4 per cent. per annum on September 12, 1917, and accumulating at compound interest calculated at that rate with yearly rests and deducting income tax would, with the accumulations of interest, amount, on the day when the instalment was or shall be received, to the amount actually received, including interest, if any, and the sum so ascertained must be treated as capital and the difference between it and the sum actually received as income. It by no means follows from this that in every case where the outstanding estate is represented in part by a right to receive purchase or other moneys by deferred instalments or includes a terminable annuity the tenant for life is entitled to insist on apportionment. *Crawley* v. *Crawley* (1), to which Mr. Wood was good enough to draw my attention after this case had been argued, is an instance of a case in which the tenant for life was held entitled only to the income derived from the investment of the payments made on account of the annuity, but the facts there were quite different from those of this case, and I do not think that in deciding as I have done I have arrived at any conclusion inconsistent with the judgment of Shadwell V.-C.

Solicitor for all parties: *Wellington Taylor.*

(1) (1835) 7 Sim. 427.

G. M.

EVE J.
1919
May 9.

In re GIBBONS.

GIBBONS *v.* GIBBONS.

[1919 G. 424.]

Will—Construction—Option—House—Residence for Life on Conditions—Forfeiture—Powers of Tenant for Life—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 51.

By his will, a testator, after providing for the upkeep of his house, grounds, and furniture as a residence for his family until the youngest of his children came of age, gave to his eldest son, as soon as that event happened, the option of occupying and enjoying the use of this residence and furniture during his life, without payment of rent, but paying rates, taxes, outgoings, and keeping the premises insured and repaired, such option to be exercised by a written notice to the trustees of the will within three months from the time when the right to exercise it arose. Subject to this similar options were given in succession to the other two children of the testator, and there was an ultimate gift of his residuary estate to his trustees in trust for his three children. The testator's youngest son having attained twenty-one, the eldest son in January, 1913, duly gave notice to the trustees of his exercise of the option of occupying and enjoying the house and furniture. He resided in the house until 1916, when he let it unfurnished for fourteen years and removed the furniture:

Held, that the option contained in the will conferred no estate or interest upon the son, and could not properly be construed as a gift of the use and occupation of the house. It was a conditional offer, and upon the son ceasing to comply with the conditions by exercising his statutory powers the option and his whole interest in the premises thereupon determined.

In re Paget's Settled Estates (1885) 30 Ch. D. 161, and *In re Carne's Settled Estates* [1899] 1 Ch, 324 ; 68 L. J. (Ch.) 120 distinguished.

ADJOURNED SUMMONS.

By his will dated March 16, 1900, Alfred Robert Gibbons appointed the plaintiffs executors and trustees, and to be trustees thereof for the purpose of any Act of Parliament. By clause 11 of his will the testator gave directions to his trustees for the expenditure of 1000*l.* per annum for the keeping up, repairing, and insuring of his residence known as "Pears Hill," Windlesham, Surrey, and the garden and grounds, and also all furniture, plate, and effects, both indoor and outdoor, as a residence for his children for so long a

EVE J.
1919
GIBBONS, *In re.* GIBBONS *v.* GIBBONS.

period, previously to his younger child for the time being attaining the age of twenty-one, as his trustees should think fit. Clause 14 of the will was as follows: "I give to my eldest son, Sidney Alfred Gibbons, as soon as my youngest child for the time being shall have attained the age of twenty-one years, the option of occupying and enjoying the use of the premises mentioned in para. 11 during his life without payment of rent, but paying all rates, taxes, and outgoings, and keeping the said premises in a proper state of insurance and in good and substantial repair, such option to be exercised by a notice in writing to be given or sent to my trustees by the said Sidney Alfred Gibbons within three calendar months from the time when the right to exercise such option shall arise." Subject as aforesaid the testator, by clause 15, gave a similar option to his second son, Edwyn Ingram Gibbons, and to his daughter Nora Gibbons in succession, to be exercised in like manner, and by clause 16 the trustees were not, during the residence of any of the testator's said children at "Pears Hill," to be in any manner responsible for the state and condition, or the insurance or repairs of the buildings, or the safe custody or preservation or insurance of the chattels or effects in the occupation of any of his said children.

By subsequent clauses of his will the testator gave his residuary real and personal estate to his trustees upon trust for conversion, with directions for the payment of certain annual sums for the benefit of his children while under twenty-five, and he then directed that his residuary estate should be held in trust for such one or more of his children, the defendants, Sidney Alfred Gibbons, Nora Hobbs (formerly Nora Gibbons) and Edwyn Ingram Gibbons, as being male should attain twenty-five, and not have alienated or charged their interests in his estate, or, being female, should attain the age of twenty-one or marry under that age. All the testator's three children had attained twenty-five, and the sons had not alienated or charged their interests.

Edwyn Ingram Gibbons, the testator's younger son, attained twenty-one on November 2, 1912, and on January 6, 1913,

Sidney Alfred Gibbons gave notice in writing to the trustees exercising the option of occupying and enjoying the use of "Pears Hill" and the furniture therein. On April 29, 1917, E. I. Gibbons died, and the third defendant, Gladys Violet Gibbons, was his legal personal representative. After the exercise of his option, S. A. Gibbons entered into the occupation of "Pears Hill" and used the furniture therein until the autumn of 1916. He then ceased to occupy the house, and by a lease, dated February 22, 1917, let it unfurnished for a term of fourteen years, and removed the furniture, taking the greater part of it to a smaller house at Reading which he rented.

The defendant, Nora Hobbs, having claimed that on S. A. Gibbons ceasing to occupy "Pears Hill" and removing the furniture the house and furniture fell into the testator's residuary estate, a summons was taken out by the trustees of the will asking whether that was so according to the true construction of the will, or whether the said defendant still remained life tenant thereof.

J. E. Harman for the trustees.

Sheldon for Sidney Alfred Gibbons. This defendant is still tenant for life, or a person having the powers of a tenant for life under the Settled Land Act, 1882. He has exercised the option and there is no gift over in the will if he ceases to occupy the house. It would not have been effective if there had been one, having regard to s. 51 of the Settled Land Act. He has let the house under his powers conferred by that Act. [He was stopped by the Court.]

W. A. Greene for the daughter, a residuary legatee. When the eldest son ceases to reside in the house he loses the gift of the house and furniture altogether. It is conceded that while in occupation under the option he had the powers of a tenant for life. Sect. 51 of the Settled Land Act, 1882, does not apply here. It is a question of the intention of the testator and the construction of the terms on which the option is given. Subject to the option the property falls into residue. There is nothing vested in the eldest son until

EVE J.
1919
GIBBONS, *In re.*
GIBBONS *v.* GIBBONS.

the condition precedent of giving notice has been fulfilled, and the interest which he takes arises under the joint effect of the will and his election to exercise the option. The whole gift now falls into residue.

D. D. Robertson for the third defendant in the same interest.

Sheldon in reply. There is in clause 14 of this will a gift to the sons and daughter in succession. Directly any one of them exercises the option he or she takes an estate of freehold for life, and it arises on a particular day. It might have been limited to the time when the person exercising the option continued personally to use and occupy the house, when a different kind of estate might have been created. But that is not this gift. It comes within the principle of the decisions in *In re Paget's Settled Estates* (1); *In re Carne's Settled Estates* (2); *In re Eastman's Settled Estates.* (3)

[EVE J. referred to *In re Hazle's Settled Estates.* (4)]

A condition which would induce the tenant for life not to exercise his option would be bad under s. 51 of the Settled Land Act, 1882, as was the case in *In re Dalrymple.* (5) Other cases on permission to reside during life are *In re Boyer's Settled Estates* (6); *In re Bond's Estate* (7); *In re Edwards' Settlement* (8); *In re Baroness Llanover's Will.* (9)

[He also referred to *In re Ames* (10) and *In re Smith.* (11)]

The defendant having let the house as tenant for life or under the powers of a tenant for life, either gets the rents and profits of the house, or they are forfeited. That would not be permissible, having regard to s. 51 of the Settled Land Act, 1882.

EVE J. The cases upon which Mr. Sheldon has mainly relied have established that where there is a gift to a legatee, either directly, or through the medium of trustees, of a right to use and occupy a particular house, the legatee has during such occupation the powers of a tenant for life, and a gift

(1) 30 Ch. D. 161.
(2) [1899] 1 Ch. 324; 68 L. J.(Ch.) 120.
(3) (1898) 68 L. J. (Ch.) 122.
(4) (1885) 29 Ch. D. 78.
(5) (1901) 49 W. R. 627.
(6) [1916] 2 Ch. 404.
(7) (1904) 48 Sol. J. 192.
(8) [1897] 2 Ch. 412.
(9) [1903] 2 Ch. 16.
(10) [1893] 2 Ch. 479.
(11) [1899] 1 Ch. 331.

over in the event of his failing to comply with the condition as to residence may be defeated by the exercise of the statutory powers, the condition being void, in that it is calculated to fetter the legatee in the exercise of his statutory powers. But it is said that the present case is not within the principle of those decisions, inasmuch as the legatee takes no estate or interest, but is merely given an option which he must exercise as it stands, or not at all. He is not entitled, it is argued, to treat it as an option to take something not intended to be given to him by the testator. Although it may not be very material, it cannot be altogether disregarded that the obvious intention of the testator was that this house should continue to be the home of the family. By clause 11 of his will he provides for the upkeep of the house as a residence for the family until the youngest of his children comes of age, and then by clauses 14 and 15 he gives successive options to the children to continue to reside in the house. As the eldest son to whom priority was given exercised the option it is only necessary to consider clause 14. [His Lordship read clause 14, and continued :] That clause gives no estate or interest to the son ; it offers him on certain conditions the opportunity of electing to reside in the house. I do not think that can properly be construed as a gift of the use and occupation of the house ; it is a conditional offer which the beneficiary may accept or reject, but if he accepts it he must do so subject to the conditions, and when the conditions are no longer being complied with the option determines. In the present case further compliance with the conditions has been rendered impossible by the beneficiary having exercised the statutory powers conferred upon him during his occupation, and when by his own act he rendered himself incapable of complying with the terms upon which alone he was entitled to any interest in the premises I think his whole interest therein was thereupon determined. The same result follows with regard to the furniture.

Solicitors : *Potter, Sandford & Kilvington ; McKenna & Co. ; George R. Cran.*

G. M.

SARGANT J.

1919

March 14, 20, 21.

In re WESTERTON.

PUBLIC TRUSTEE *v.* GRAY.

[1918 W. 1174.]

Voluntary Gift—Assignment—Absolute Assignment in Writing—Money on Deposit at Bank—Banker's Deposit Receipt—Authority to Bank to pay —Delivery—Debt—Legal Chose in Action—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6.

About a year before his death, which happened in 1917, the testator handed to his landlady Mrs. G. an envelope addressed to her describing it as a present to her. She was about to open it, when he took it from her hand and said he would keep it for her and locked it up in his despatch box. After the testator's death there was found in his despatch box an envelope containing: (1.) A deposit receipt for 500*l.* deposited with his bank in 1914; (2.) an order in writing signed by the testator directing the bank to pay to Mrs. G. the sum of 500*l.* then on deposit; and (3.) a letter addressed to Mrs. G.: "You have been very kind to me and I desire to make some return by giving you the amount of 500*l.* now on deposit at the . . . . bank as per receipt enclosed." The deposit receipt was not indorsed by the testator and no notice was given to the bank of any assignment till after his death, the interest on the sum on deposit having been carried by the bank to his current account:—

Held, that there was a valid and complete gift to Mrs. G. of the sum on deposit by way of assignment under the Judicature Act, 1873, s. 25, sub-s. 6.

The effect of that sub-section has been to improve the position of the donee of a legal chose in action by enabling him to sue at law in his own name as assignee without regard to the question whether the assignment was or was not made for valuable consideration.

ADJOURNED SUMMONS.

On January 6, 1914, Henry George Westerton, the testator, placed a sum of 500*l.* on deposit in his name at the London County and Westminster Bank, and took from the bank the usual deposit receipt for the amount. The receipt stated: "The rate of interest payable on deposit is subject to the fluctuations of the money market and will be announced from time to time by public advertisement; seven days' notice must be given of the intention to withdraw the whole or any part of the deposit. This receipt duly indorsed must

be returned at the time of withdrawal. 500*l.*" In the margin were the words "Deposit Receipt. Not transferable," and on the back a form of receipt was indorsed, "Received the sum of the within-named deposit" with space for a stamp and the words "Signature to be written across the stamp."

The testator, who died on May 16, 1917, by his will dated September 22, 1913, appointed his daughter Blanche Bloomfield and the Public Trustee to be his executors and trustees and gave to them his residuary estate upon the trusts therein declared.

According to the undisputed evidence of Mrs. Gray from 1905 to 1913 the testator had been in the habit of taking furnished lodgings at her house at 4 Cliff Terrace, Budleigh Salterton, for a few weeks in each year, and from December, 1913, until his death he permanently lodged there. She attended to him and on several occasions she assisted to nurse him in illness. He always appeared to be very grateful and showed a kind interest in her affairs and gave her advice in business matters and sometimes took charge of money and effects for her. One day in the early part of 1916 he called her into his bedroom where he was sitting with his despatch box open before him. He handed her an envelope addressed to her and said: "Here's a present for you, Mrs. Gray; that is for you. I have given it into your hand." She took the envelope from him and said: "I will see what is inside," and was about to open it when he took it from her hand and said: "Remember, I'll keep it for you." She accordingly returned it to him, and he at once placed it in his despatch box. He then said again: "Remember, I'll keep it for you." She did not attach much importance to his action as on past occasions he had with an air of solemnity given her things of no value, as, for instance, an empty match-box which he wanted taken out of the room. She said, "Yes, keep it for me. I shan't miss anything if it is like the old rubbish you generally give me." He replied: "Rubbish, is it? It is worth 500*l.*" She thought he was joking (as he often did), and replied, "You keep it for me until it is

SARGANT J. 1919 WESTERTON, *In re.* PUBLIC TRUSTEE *v.* GRAY.

1000*l*." He did not refer to the matter again. After the testator's death, his daughter Mrs. Bloomfield found in his bedroom in a locked despatch box an envelope addressed to Mrs. Gray. The envelope, which was the same as that which was handed by the testator to Mrs. Gray on the occasion referred to, was opened by Mrs. Gray and found to contain three documents, namely the deposit receipt, a letter, and an order on the bank. The letter was as follows:

"26 Feb. 1915, 3 Feb. 1916, 9 Nov. 1916.

"Dear Mrs. Gray,—

"You have been very kind to me, and I desire to make some return by giving you the amount of 500*l*., now on deposit at the London County and Westminster Bank, as per receipt enclosed.

"Yours gratefully,

"H. G. WESTERTON,

"Feb. 27, 1915."

The order on the bank was as follows:

"The London County and Westminster Bank,
4, Mincing Lane, London.

"Pay to Mrs. Clara Gray, of 4 Cliff Terrace, or order the sum of Five hundred pounds now on deposit at your bank as per receipt No. 1768, dated 6 January, 1914, 500*l*.—H. G. WESTERTON."

The testator had not indorsed the deposit receipt and the indorsed form of receipt on the back had not been filled in. No notice of any assignment was given to the bank until after the death of the testator and the interest as it accrued on the sum on deposit had been carried to the credit of the testator's current account at the bank.

The bank subsequently paid the sum on deposit to the Public Trustee on receiving an indemnity from him, and this originating summons was taken out by the Public Trustee to determine the question whether there had been a valid gift or assignment to Mrs. Gray of the sum in question, the parties agreeing to have the question determined on originating summons.

St. John Clerke for the summons.

J. M. Gover for Mrs. Gray. The three documents together amounted to a complete gift of the sum on deposit to Mrs. Gray and operated as an absolute assignment of the legal chose in action within the Judicature Act, 1873, s. 25, sub-s. 6. (1) The sum on deposit was clearly a legal chose in action or debt owing to the testator from the bank: *In re Dillon* (2), and the assignment was good as between assignor and assignee without notice to the bank provided that such notice was given before action brought by the assignee: *Bateman* v. *Hunt* (3); *Walker* v. *Bradford Old Bank.* (4) In the face of the letter directing the bank to pay the money to Mrs. Gray it is immaterial that the receipt note was not indorsed by the testator or that the form of receipt indorsed thereon was not filled up. There was no condition that the bank would not pay unless the particular form of receipt was signed and produced: *In re Dillon.* (2) It is immaterial also that the documents remained in the custody of the testator. The gift was complete when the testator delivered them to Mrs. Gray; the redelivery of them by her to the testator was only for safe custody. The only remaining question is as to the absence of valuable consideration. I submit that independently of the Judicature Act, 1873, s. 25, sub-s. 6, there was in the absence of any consideration a complete gift of this sum on deposit to the donee, but however the case might have stood according to

(1) Judicature Act, 1873, s. 25 (6.): "Any absolute assignment, by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed), to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: . . . ."

(2) (1890) 44 Ch. D. 76.

(3) [1904] 2 K. B. 530.

(4) (1884) 12 Q. B. D. 511.

SARGANT J. 1919 WESTERTON, *In re.* PUBLIC TRUSTEE *v.* GRAY.

the old doctrines of equity prior to the Judicature Act, 1873, the want of valuable consideration is no longer an objection to the validity of the gift. Sect. 25, sub-s. 6, of that Act has improved the position of the assignee who fulfils the requirements of that sub-section by enabling him to sue at law in his own name without regard to any question of valuable consideration: *Harding* v. *Harding* (1); *Knill* v. *Prowse* (2); *Brandts, Sons & Co.* v. *Dunlop Rubber Co.* (3) The present case is very like *In re Griffin.* (4) *In re Williams* (5) is distinguishable, since in that case there was a condition of the donee surviving the testator, and the only document was a revocable mandate on the insurance office to pay.

Alternatively I submit that Mrs. Gray is entitled to succeed on the footing of a valid declaration of trust.

[He also referred to *Glegg* v. *Bromley* (6) and *Brice* v. *Bannister.* (7)]

J. M. Paterson for the residuary legatees. The case for Mrs. Gray has been rested on the Judicature Act, 1873, but that Act only altered procedure and did not enlarge the class of contract which may be assigned since the Act, nor did it affect the question whether or not the assignment is valid at law or in equity: *Durham Brothers* v. *Robertson* (8); *Tolhurst* v. *Associated Portland Cement Manufacturers.* (9) I do not dispute that according to *Walker* v. *Bradford Old Bank* (10) notice of assignment may be given at any time before action is brought; but here notice was essential to complete the assignment. This is the case of an imperfect gift. The order on the bank was like a cheque revoked by death: *In re Beaumont.* (11)

The mere delivery of the deposit receipt was not sufficient to effect an assignment of the debt; everything that was possible to complete the claimant's title to sue the bank was not done: *Trimmer* v. *Danby* (12); *Beech* v. *Keep.* (13) To

(1) (1886) 17 Q. B. D. 442.
(2) (1884) 33 W. R. 163.
(3) [1904] 1 K. B. 387.
(4) [1899] 1 Ch. 408.
(5) [1917] 1 Ch. 1.
(6) [1912] 3 K. B. 474, 489, *per* Parker J.
(7) (1878) 3 Q. B. D. 569.
(8) [1898] 1 Q. B. 765.
(9) [1901] 2 K. B. 811.
(10) 12 Q. B. D. 511.
(11) [1902] 1 Ch. 889.
(12) (1856) 25 L. J. (Ch.) 424.
(13) (1854) 18 Beav. 285.

bring the case within the terms of sub-s. 6 is not enough unless the gift is perfected. The testator omitted to sign the indorsed receipt. It was an imperfect voluntary assignment which equity will not assist: *Edwards* v. *Jones.* (1) *Harding* v. *Harding* (2) is distinguishable, as there everything had been done to make the voluntary assignment a completed act. In *In re Griffin* (3) there was an order to pay indorsed on the deposit receipt without the production of which the bank would not pay; here the testator had not signed the receipt. The Judicature Act, 1873, s. 25, sub-s. 6, alters procedure merely and does not enlarge the former rights of a person whose title is derived from an imperfect voluntary gift. An absolute assignment within the meaning of the sub-section means an effective assignment by which the property in the chose in action is divested entirely out of the assignor. Moreover the facts in the present case show that the testator did not mean the gift to take effect until his death and intended it to be in the nature of a testamentary disposition, as in *In re Williams.* (4) [He also cited *Jones* v. *Lock* (5); *Hambleton* v. *Brown* (6); *McEneaney* v. *Shevlin* (7); *Torkington* v. *Magee* (8); *Marchant* v. *Morton, Down & Co.* (9)]

[SARGANT J. referred to Spence's Equitable Jurisdiction (1849), vol. ii., pp. 852, 854.]

J. M. Gover in reply referred to *Milroy* v. *Lord.* (10)

SARGANT J. stated the question raised by the summons and the facts as above set out, and continued: The first question is whether the testator purported to make a clear gift then and there to Mrs. Gray or whether he was only expressing a desire to make a gift to her in the future. The letter written by the testator to Mrs. Gray, according to the construction which I place on it, amounted to an out and out gift and not to an expression of a mere desire to make a gift. In the same way the direction to the bank

(1) (1836) 1 My. & Cr. 226.
(2) (1886) 17 Q. B. D. 442.
(3) [1899] 1 Ch. 408.
(4) [1917] 1 Ch. 1.
(5) (1865) L. R. 1 Ch. 25.
(6) [1917] 2 K. B. 90.
(7) [1912] 1 Ir. R. 32, 278.
(8) [1902] 2 K. B. 427; [1903] 1 K. B. 644.
(9) [1901] 2 K. B. 829.
(10) (1862) 4 D. F. & J. 264.

SARGANT J. 1919 WESTERTON, *In re.* PUBLIC TRUSTEE *v.* GRAY.

to pay to Mrs. Gray the sum on deposit seems to me to be a direct order to the bank operating by way of transfer to Mrs. Gray of the testator's right to receive the money from the bank, and I do not think that there was anything future or hypothetical or contingent about it. On the face of that letter I think it was a direct assignment to Mrs. Gray of the sum of 500*l.* on deposit at the bank. Those documents were delivered by the testator to Mrs. Gray, and what subsequently happened was in my view a return by Mrs. Gray to the testator of those documents on the terms that he was to put them in his safe and take charge of them for her. It does not seem to me that there was any renunciation or retransfer or repudiation of the gift by her. There was a mere return by her of the documents to the testator for the purpose of holding them in safe custody on her behalf, which in no way affected the result of the previous delivery.

I have to consider next whether there was, apart from the question of consideration, an effectual transfer to her of the legal right to sue the bank. I do not attach any importance to the fact that there was no indorsement on the actual deposit receipt itself. Inasmuch as the deposit receipt was clearly referred to and identified in the letter of direction to the bank it appears to me that that direction to pay is just as good as if the direction had been indorsed on the deposit receipt itself. If one can compare the facts in one case with those in another I think the terms of transfer in the present case are at the least as strong as the terms of transfer, for instance, in *Brice* v. *Bannister* (1), a well-known case as to the transfer of part of a sum of money to accrue due on a contract. Further, the presence on the back of the deposit receipt of a form of receipt which might be signed by the person who would ultimately receive the money and the fact that that form was not filled in by the testator do not appear to me to be of any importance. The presence of that particular form of receipt was not in any way a condition as to the terms on which the money might be required by the

(1) 3 Q. B. D. 569.

depositor; it was merely a convenient means of completing the transaction when the sum on deposit should be paid off. The facts in the present case are stronger than the facts in *In re Dillon* (1), where Cotton L.J. held that the presence of a blank form of payment on the back of the deposit note did not amount to a condition. Another point which I ought to mention is that no notice of the assignment was given to the bank at the time; but it was not disputed by Mr. Paterson that the mere omission to give notice at the time was of no consequence so long as notice was given before action brought. That omission in no way affected the efficacy of the assignment as between the donor and the donee, though, if the bank, having had no notice of the assignment, had paid the money to the testator, that payment would have been a good payment as against the donee; and in fact the interest on the deposit note was from time to time, as I gather, credited to the credit of the testator's current account. That was a good credit as against Mrs. Gray, and Mr. Gover does not claim any interest that was so credited.

I now turn to the principal difficulty in the case, and that is the absence of valuable consideration. It seems to me, though I am not sure that it was completely admitted by Mr. Gover, that apart from the Judicature Act, 1873, s. 25, sub-s. 6, the want of consideration would have been fatal to Mrs. Gray's claim. Prior to the Judicature Act, 1873, a legal chose in action such as this debt could not be transferred at law, and the assignee of the debt could only have sued in the name of the assignor, and in the absence of consent by the assignor or of a binding contract by the assignor to allow the use of his name, the use of the assignor's name could only have been enforced by filing a bill in equity and so obtaining an injunction in personam to allow the use of the name, and equity would not have granted that relief unless the assignment had been for valuable consideration. But to my mind the effect of s. 25, sub-s. 6, of the Judicature Act, 1873, has been to improve the position of the assignee of a chose in action who satisfies the words of the sub-section,

(1) 44 Ch. D. 76, 81.

SARGANT J.
1919
WESTERTON, *In re.*
PUBLIC TRUSTEE v. GRAY.

that is to say, an assignee under an absolute assignment by writing under the hand of the assignor not purporting to be by way of charge only, by enabling that assignee to dispense at law with the use of the name of the assignor and so to dispense with the circuitous process of compelling the assignor in equity to allow his name to be used in proceedings by the assignee. The result of the sub-section is that an assignee who takes under such an absolute assignment as is there mentioned can now sue at law in his own name, and I see no reason why in the present case the assignee should not do so.

There appear to me to be two, if not three, decisions which assist me in coming to that conclusion. The first case is *Harding* v. *Harding* (1), which was a case at law where a person taking under a voluntary assignment of an ascertained balance due from trustees was held to be entitled to sue the trustees directly. The second case is *In re Griffin* (2), decided by Byrne J. in 1899, which is in many respects a case very much like the present. There there had been a gift of a banker's deposit receipt with an indorsement by the donor on the back, and the learned judge held that that was a good equitable assignment of the amount on deposit at the bank. It is quite true that in that case there was a second ground on which the learned judge said that the donee was also entitled to succeed—namely, that he had been appointed executor of the donor, and that therefore the transaction fell within the decision of *Strong* v. *Bird*. (3) It is quite clear however from his judgment that the learned judge would have reached the same conclusion apart from that second ground, and the first reason which he gave for his decision is in my opinion completely applicable to the present case. The third case which is in some respects similar to the present is *In re Williams* (4), where it was held that the alleged assignment was bad as being conditional and future. It is to be noticed however that the assignment in that case was an assignment without consideration, and if the question of consideration was essential there was a very simple means of arriving at

(1) 17 Q. B. D. 442.
(2) [1899] 1 Ch. 408.
(3) (1874) L. R. 18 Eq. 315.
(4) [1917] 1 Ch. 1.

the conclusion at which the Court of Appeal arrived without the necessity of going through the difficult questions arising in that case as to the real meaning of the documents. It appears to me that the Court of Appeal really assumed in that case—without, I agree, actually deciding the point—that the voluntary character of the assignment was not fatal to its efficacy.

Then it was urged by Mr. Paterson that the object of s. 25. sub-s. 6, was only to alter procedure and not to make any difference in the extent or nature of those things that were liable to be equitably assigned. I agree with that argument, though not with the conclusion which he based on it. It does seem to me that the aim of the sub-section was to reform procedure and to make it unnecessary for an assignee who had an out and out assignment to go through the double process that was formerly necessary in the case of an unwilling assignor—that is to say, an assignor who was afterwards unwilling to lend his name—of first proceeding in equity to compel the use of the name of the assignor and then proceeding to sue at law in the name of the assignor. To that extent, as I have said, the position of the assignee as a question of procedure was improved; he could come at once at law, and come not in the name of the assignor but in his own name as assignee. But if that is so and by means of that simplification of procedure the assignee has been relieved from taking preliminary proceedings in equity, there seems to me to be nothing very startling in the further conclusion, that the assignee has also been relieved from the terms which equity imposed as a condition of assisting him in obtaining the legal right, if at law the question of consideration was regarded as wholly immaterial; and I think that it must have been so regarded for this reason, that at law the action was brought in the name of the assignor, so that there was no question at all of any transaction between the assignor and the assignee under which the question of consideration could arise. If that be so and if since the Judicature Act, 1873, the assignee can come directly in his own name and sue as effectually

SARGANT J. 1919 WESTERTON, *In re.* PUBLIC TRUSTEE *v.* GRAY.

as he could have done in the name of the assignor, it appears to me that there is no reason for continuing against the assignee those terms which were imposed by equity as a condition of granting relief. The position of the assignee has in this respect been improved once and for all by the sub-section of the Judicature Act in question, which has conferred on him a legal right to sue, and in my judgment I ought not to consider that legal right as being in any way dependent upon the question whether the assignment was made for valuable consideration or not, provided it complies with the express conditions of that sub-section. In my judgment, therefore, Mrs. Gray is entitled to the sum of 500*l.* in question with interest from the date of the death of the testator.

Solicitors for plaintiff and beneficiaries: *Parfitt & Cresswell.*

Solicitors for Mrs. Gray: *Coode, Kingdon, Cotton & Ward, for Jackson & Parkhouse, Exeter.*

A. C.

ASTBURY J. 1919 *April* 15, 29; *May* 9.

In re FRASER AND CHALMERS, LIMITED.

[0069 of 1919.]

Company—Winding Up—Preference Shares—Priority as to Capital—Surplus Assets—Right to participate—Companies (Consolidation) Act, 1908 (8 *Edw.* 7, *c.* 69), *s.* 186.

A provision merely giving preference shareholders priority for repayment of their capital in a winding up does not negative their ordinary right as corporators to participate in surplus assets.

In re Espuela Land and Cattle Co. [1909] 2 Ch. 187 followed.

Observations in *In re National Telephone Co.* [1914] 1 Ch. 755 not followed.

ORIGINATING SUMMONS.

The above company was incorporated on January 7, 1890. The memorandum provided as follows:—

Clause 5. The capital of the company is 525,000*l.*, divided into 105,000 shares of 5*l.* each, with power to divide the shares in the capital for the time being, original or increased,

into different classes of shares, with any preferential, deferred, qualified, or special rights and privileges and conditions attached thereto.

The articles provided as follows :—

Art. 43. The company in general meeting may from time to time increase the capital by the creation of new shares of such amount as may be deemed expedient.

Art. 44. The new shares shall be issued upon such terms and conditions, and with such rights and privileges annexed thereto as the general meeting resolving upon the creation thereof shall direct, and if no direction be given as the directors shall determine, and in particular such shares may be issued with a preferential or qualified right to dividends and in the distribution of assets of the company, and with a special or without any right of voting.

Art. 47. Except so far as otherwise provided by the conditions of issue, or by these presents, any capital raised by the creation of new shares shall be considered part of the original capital, and shall be subject to the provisions herein contained with reference to the payment of calls and instalments, transfer and transmission, forfeiture, lien, surrender and otherwise.

Art. 74. Every member shall have one vote for every share held by him.

Art. 110 (9.) empowered the directors: "Before recommending any dividend, to set aside out of the profits of the company such sums as they think proper as a reserve fund to meet contingencies, or for equalising dividends, or for repairing, improving and maintaining any of the property of the company, and for other purposes as the directors shall in their absolute discretion think conducive to the interests of the company, and (subject to clause 4 hereof) to invest the several sums so set aside upon such investments as they may think fit, and from time to time deal with and vary such investments, and dispose of all or any part thereof for the benefit of the company, and to divide the reserve fund into such special funds as they think fit, and to employ the reserve fund, or any part thereof, in the business of the company,

ASTBURY J. 1919 FRASER AND CHALMERS, LIMITED *In re.*

and that without being bound to keep the same separate from the other assets.

Art. 148. If the company shall be wound up, the liquidators (whether voluntary or official) may, with the sanction of an extraordinary resolution, divide among the contributories in specie any part of the assets of the company, and may, with the like sanction, vest any part of the assets of the company in trustees, upon such trusts for the benefit of the contributories as the liquidators, with the like sanction, shall think fit.

By special resolutions of June 8 and 25, 1894, it was resolved :—

1. That the present capital of the company be reduced from 525,000*l.* divided into 105,000 shares of 5*l.* each to 315,000*l.* divided into 105,000 shares of 3*l.* each, and that such reduction be effected by cancelling to the extent of 2*l.* per share the amount paid up in respect of each of the said 105,000 shares which have been issued, as being capital which has been lost or is unrepresented by available assets.

2. That the capital of the company be increased by the creation of 21,000 new shares of 3*l.* each, to be called "preference shares," to which there shall be attached the special rights and privileges following, that is to say:—

(1.) The holders of such shares shall be entitled to a fixed cumulative preferential dividend at the rate of 7*l.* 10*s.* per cent. per annum on the capital for the time being paid up on such shares respectively.

(2.) Whenever the profits of the company in respect of any calendar year shall be more than sufficient to pay the preferential dividend aforesaid to the close of such year, and also a dividend for such year at the rate of 7*l.* 10*s.* per cent. per annum on the capital paid up on the ordinary shares, the holders of the preference shares aforesaid shall be entitled to participate in any further dividend that may be paid for such year pari passu with the holders of the other shares in proportion to the capital paid up thereon.

(3.) The capital paid up on the preference shares aforesaid

shall not be liable to cancellation or reduction in respect of loss or depreciation.

(4.) In the event of the winding up of the company, the holders of the said preference shares shall have a preferential right as regards repayment of capital and otherwise as hereinafter mentioned, and accordingly shall be entitled to have the surplus assets applied, First, in paying off the capital paid up on the preference shares held by them respectively, and Secondly, in paying off the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding up before any return or payment of capital is made to the holders of the other shares.

(5.) The preference shares aforesaid shall be issued to such persons and on such terms and conditions as the directors may think fit.

On July 28, 1894, the reduction was confirmed by the Court, and the capital consisted of 378,000*l.* made up of 315,000*l.* in 3*l.* ordinary shares and 63,000*l.* in 3*l.* preference shares.

On December 11, 1900, the capital was increased to 450,000*l.* by the creation of 24,000 3*l.* ordinary shares making 21,000 preference and 129,000 ordinary shares.

By special resolutions of January 4 and 25, 1917, each preference and ordinary share was divided into three 1*l.* shares.

By special resolutions of January 2 and 23, 1919, the company was wound up voluntarily and a liquidator appointed.

All the preference shares and 378,000 out of a possible 387,000 ordinary shares were issued and fully paid. All arrears of dividends on the preference shares had been paid up to the commencement of the winding up.

The assets, of which 100,000*l.* stood to a reserve account, were very considerable. After payment of the company's liabilities, costs of liquidation, preference capital and arrears of preference dividends, and ordinary capital, there were surplus assets of 150,000*l.*

The question arose whether the preference shareholders were entitled to participate in these surplus assets, or whether thay all belonged to the ordinary shareholders.

ASTBURY J. 1919 FRASER AND CHALMERS, LIMITED, *In re.*

On March 21, 1919, the liquidator issued this summons to determine the point.

Jenkins K.C. and *J. W. M. Holmes* for the liquidator.

Clauson K.C. and *Tyldesley Jones* for the preference shareholders. Sect. 186 of the Companies (Consolidation) Act, 1908, provides that on a voluntary winding up the company's property shall be applied in satisfaction of its liabilities pari passu, and subject thereto shall "unless the articles otherwise provide" be distributed among the members according to their rights and interests in the company. Prima facie therefore all corporators have equal rights in surplus assets.

In the present case the memorandum and articles do not deprive the preference shareholders of any rights; indeed art. 47 expressly provides that new shares shall be considered part of the original capital.

The only question is whether the resolutions negative these corporate rights.

Now resolution 2, sub-clause 4, is obviously intended to give the preference shareholders an additional privilege, namely, a priority for their capital in a winding up. It does not come into operation unless there is a deficiency, and it does not expressly or by implication touch the question of surplus assets.

The preference shareholders are therefore not deprived of their corporate right to participate in surplus assets: *In re Espuela Land and Cattle Co.* (1)

It is no doubt true that a fixed preferential dividend impliedly negatives a right to share in surplus profits while the company is a going concern: *Will* v. *United Lankat Plantations Co.* (2) But Cozens-Hardy M.R. and Farwell L.J. both pointed out that different considerations applied to capital rights in a winding up, and in the House of Lords (3) Lord Haldane L.C. was evidently dealing with dividend rights only.

In *In re National Telephone Co.* (4), however, Sargant J.

(1) [1909] 2 Ch. 187.
(2) [1912] 2 Ch. 571, 578, 580.
(3) [1914] A. C. 11, 16, 17.
(4) [1914] 1 Ch. 755, 774.

treated preferential dividend and capital rights as being on the same footing, and held that they negatived any right to participate in surplus profits or surplus assets respectively. Though possibly right in the particular case his general observations so far as capital rights are concerned are directly contrary to the *Espuela Case* (1) and to Lord Macnaghten's observations in *Birch* v. *Cropper* (2), and are not supported by the *Lankat Case*. (3)

If the preference shareholders were strictly limited to the rights expressly conferred by the resolutions, they would have no right of voting.

Upjohn K.C. and *H. E. Wright* for the ordinary shareholders. The preference shareholders have no doubt rights of voting and other general rights as members under the memorandum and articles, but their special rights as to dividend and capital are expressly defined by the resolutions creating their shares. These resolutions constitute the entire bargain as to their dividend and capital rights and displace art. 47 just as the resolutions in the *Lankat Case* (4) displaced arts. 43 and 115.

These resolutions give them a fixed cumulative preferential dividend with a right to participate in surplus profits in any year after the ordinary shareholders have received the same dividend. They also give them priority as to repayment of capital, but with no corresponding provision enabling them to participate in surplus assets after the ordinary capital is repaid. This omission is very significant.

In the *Espuela Case* (1) the bargain was contained in the memorandum and articles at large, and on construction Swinfen Eady J. held that the right to participate in surplus assets was not negatived.

In the present case the bargain is contained in resolutions obviously intended to define the dividend and capital rights exhaustively, and the case falls within the *National Telephone Case*. (5)

In *Birch* v. *Cropper* (6) there was no provision as to the

(1) [1909] 2 Ch. 187.
(2) (1889) 14 App. Cas. 525, 546.
(3) [1912] 2 Ch. 571; [1914] A. C. 11.
(4) [1912] 2 Ch. 571, 578; [1914] A. C. 11, 16, 17.
(5) [1914] 1 Ch. 755, 769, 771-774.
(6) 14 App. Cas. 525.

ASTBURY J.
1919
FRASER AND CHALMERS, LIMITED, *In re.*

distribution of capital in a winding up, so that there was nothing to negative the ordinary corporate rights of the preference shareholders.

Clauson K.C. in reply.

Cur. adv. vult.

May 9. ASTBURY J. (after stating the facts). The only statutory provision directly affecting the question I have to decide is s. 186 of the Companies (Consolidation) Act, 1908, which provides that, "on a voluntary winding up, the property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company." All shareholders are entitled to equal treatment unless and to the extent that their rights in this respect are modified by the contract under which they hold their shares. This contract, so far as the preference shares are concerned in the present case, is contained in the resolutions of 1894, which were in accordance with the rights and powers of the company as contained in its memorandum and articles.

There are only two authorities directly bearing upon the question in issue, and as the learned judges who decided them are not in accord, I propose to discuss in the first place what, apart from authority, is the true construction and effect of the contract under which the preference shareholders hold their shares. Under the second resolution these shares have attached to them certain defined special rights and privileges, that is, (1.) a fixed dividend of 7½ per cent. which is preferential and cumulative; and (2.) the additional rights conferred in resolution 2, sub-clause 2. The meaning and effect of the first of these provisions is that with regard to the fund distributable as dividend in each calendar year of the company's existence as a going concern, the dividend payable to the preference shareholders is fixed by contract and not by the amount of dividends distributed; in other words their dividend is one of 7½ per cent. and not a rateable proportion of the total sum distributed. This is, and subject

to one overruled decision, always has been the accepted meaning of a fixed preferential dividend, but there being nothing in law to prevent a company from contracting, in an event, to pay a further and additional sum the preference shareholders in this company obtained by contract the additional rights, qua dividend, provided in resolution 2, sub-clause 2.

The remaining sub-clauses of the resolution refer to capital. In the first place the preference capital is not to be subject to cancellation or reduction in respect of loss or depreciation, and sub-clause 4 gives a preferential right in the order of repayment of the company's debt to capital account in the event of a winding up, and provides for the discharge of any arrears of preferential dividend before any return or payment of capital is made to the ordinary shareholders. This provision differs entirely from that relating to dividend. The dividend clause provides for the exhaustion of an annual distributable sum, whereas the capital clause merely provides for the order in which certain of the company's obligations are to be met in a winding up. It is really only directly concerned with a deficiency of assets to satisfy the capital liability, because if there is more than sufficient to do so it is wholly irrelevant in what particular order the capital debts are in fact met. It does not in form or in substance deal with the whole corporate assets except in the case of a deficiency and then only by implication. No reference is made to any remaining assets after the capital is repaid to all the shareholders, and no provision is made depriving the preference shareholders of their rights as corporators with regard thereto. It seems to me impossible to say that, because it is provided that certain debts of the company shall be paid in a winding up in a particular order, a fund remaining after doing so which is not expressly, nor by implication, referred to at all, and which forms part of the general assets of the company, shall be divided between some, to the exclusion of other, shareholders.

The ordinary shareholders contend that the express rights given to the preference shareholders by these resolutions

ASTBURY J. 1919 FRASER AND CHALMERS, LIMITED, *In re.*

contain the whole of their rights as such. It is clear however that they do not. They have voting and other rights as corporators, and I see no reason for construing this contract as depriving them of a right to share in an ultimate surplus that is not referred to, any more than as depriving them of voting and other rights of shareholders which are in the same position.

So much for my own view of the construction of this contract. With regard to the authorities, the first is *In re Espuela Land and Cattle Co.* (1) In that case the memorandum stated that the capital was divided into ordinary and preference shares, and that the latter carried a cumulative preferential dividend of 10 per cent. on the amount for the time being paid up thereon, and also a preferential right to be repaid the amount paid up thereon and interest out of the assets of the company if the company was wound up. The articles of association stated the same preference and provided that in case the company should at any time be wound up the preference shares should be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and in priority to and before any payment should be made thereout in respect of the ordinary shares. This contract as to the issue I have to decide was substantially identical with that in the present case, and Swinfen Eady J. decided that a similar surplus was divisible between the preference and ordinary shareholders in proportion to the nominal value of their shares. He said (2): "Mr. Younger, who claimed the whole surplus on behalf of the ordinary shareholders, contended that where priority of repayment on a winding up is secured to the preference capital the preference shareholder is entitled to that repayment, but not to any further interest in the capital of the company, in the same manner as where a right to a fixed preferential dividend is secured to preference shareholders they take that fixed amount and nothing more, however large the revenue of the company may be. This, however, is merely a question of the construction of the memorandum and articles. There

(1) [1909] 2 Ch. 187. (2) [1909] 2 Ch. 193.

is not any rule of law that shareholders having a fixed preferential dividend take that only. It is quite open to a company to distribute its revenue first in paying a fixed preferential dividend, then in paying a dividend of like amount to the ordinary shareholders, and then dividing any surplus revenue of any year rateably between the preference and ordinary shareholders. An instance of this is found in *Webb* v. *Earle*. (1) .... In the absence, however, of any provision to the contrary, the rights of the shareholders are equal." When the learned judge said that there is no rule of law that shareholders having a fixed preferential dividend take that only, he clearly meant that it is open to the company and the shareholders, by contract, to provide otherwise, and his citation of *Webb* v. *Earle* (1), where this was the case, makes this apparent. In the *Espuela Case* (2) the learned judge determined that the surplus was distributable between the preference and ordinary shares. This decision accords with my own views of the contract in question, and I should have followed it without more if it had not been for certain observations in the judgment of Sargant J. in the *National Telephone Case* (3), which I will deal with in a moment.

In *Birch* v. *Cropper* (4), where no priority in a winding up was given to preference shareholders, Lord Macnaghten said: "The ordinary shareholders say that the preference shareholders are entitled to a return of their capital, with 5 per cent. interest up to the day of payment, and to nothing more. That is treating them as if they were debenture holders, liable to be paid off at a moment's notice. Then they say that at the utmost the preference shareholders are only entitled to the capital value of a perpetual annuity of 5 per cent. upon the amounts paid up by them. That is treating them as if they were holders of irredeemable debentures. But they are not debenture holders at all. For some reason or other the company invited them to come in as shareholders, and they must be treated as having all the rights of shareholders, except so far as they renounced

(1) (1875) L. R. 20 Eq. 556.
(2) [1909] 2 Ch. 187.
(3) [1914] 1 Ch. 755.
(4) 14 App. Cas. 525, 546.

ASTBURY J. 1919 FRASER AND CHALMERS, LIMITED, *In re.*

those rights on their admission to the company. There was an express bargain made as to their rights in respect of profits arising from the business of the company. But there was no bargain—no provision of any sort—affecting their rights as shareholders in the capital of the company." This, subject to the fact that in the present case, as in the *Espuela Case* (1), a preferential right as to the repayment of the company's debt to capital in a winding up is given, seems to me to sum up the position.

In *Will* v. *United Lankat Plantations Co.* (2) preference shareholders entitled to a 10 per cent. cumulative preferential dividend who had no contractual right to more in any event, were held entitled to a 10 per cent. dividend, and that only, as far as dividend was concerned, but both Cozens-Hardy M.R. and Farwell L.J. pointed out the difference between a provision as to dividend and a priority given in a winding up as to repayment of capital. Cozens-Hardy M.R., after referring to the contract in that case, said (3): "In other words, I think that although on any matter as to which the resolution is silent the articles do prevail, such, for instance, as the right of voting or the right to surplus on a winding up, in such cases, no doubt, the articles will prevail"; and Farwell L.J. said (4): "To my mind the considerations affecting capital and dividend are entirely different. The preference given to capital is in the winding up, and the preference claimed to be given to dividend here is in a going concern; and I do not think that you can reason from what will happen to capital in a winding up to what ought to happen to dividend while the company is a going concern." In the same case in the House of Lords (5), Lord Haldane L.C., referring to the resolution as to dividend, said: "Your Lordships will observe that the second resolution gave the authority to make the bargain and defined the terms which the bargain was to contain. A shareholder comes to the company and says 'I wish to contract with you for

(1) [1909] 2 Ch. 187.
(2) [1912] 2 Ch. 571.
(3) [1912] 2 Ch. 578.
(4) [1912] 2 Ch. 580.
(5) [1914] A. C. 11, 16.

a share in your capital and so to become a shareholder.' He advances his money and the terms are contained in the bargain that is made between him and the company on the issue of the share to him, and that bargain is that he is to receive a cumulative preferential dividend at the rate of 10 per cent. on the amount paid up on his share and that his preference share is to rank both as regards capital and dividend in priority to other shares. My Lords, I should have thought that if we were dealing with an ordinary case of two individuals coming together, and if a document were produced saying 'You are to have a cumulative preferential dividend of 10 per cent.' or whatever might be the equivalent in the circumstances of the bargain, it would be naturally concluded that that was the whole of the bargain between the parties on that point"—that means the whole of the bargain between the parties on the question of the quantum of dividend that the shareholder was entitled to receive. None of the opinions of the Law Lords suggest that a preferential right to be repaid capital in a winding up is exhaustive like the dividend provision and operates to deprive the shareholders who are given that preference of the right to more than a sum fixed by the face value of their shares, if there is in fact a surplus, after repayment of capital.

In *In re National Telephone Co.* (1) there was a surplus to be dealt with and a large number of different classes of shareholders. The contractual rights of the various classes were of a complicated character, and the contract as a whole, which Sargant J. had to construe, was very different to the simple contract in the case now before me. The decision itself has little bearing upon the view I take in the present case, but Sargant J. made certain observations bearing generally upon the matters that I have discussed, and in particular upon the effect of the *Espuela Case* (2), which makes it necessary for me to explain why I feel bound to arrive at the decision I have come to. Sargant J. said (3): "I should have thought that, as a matter of ordinary construction,

(1) [1914] 1 Ch. 755. (2) [1909] 2 Ch. 193.
(3) [1914] 1 Ch. 771.

ASTBURY J. 1919 FRASER AND CHALMERS, LIMITED, *In re.*

not only from the business point of view but from the legal point of view, the express mention of the rights which the preference shareholders were to be entitled to in a winding up would have operated as an exclusion of any further or other rights." This, I imagine, depends upon the language used, and does not, I think, apply in the present case. Further on he said (1): "Similarly here I should have thought, in a matter which is specially dealt with by the terms of the issue of the shares, that those terms of issue would have fully defined the terms of issue, and would not have been a mere modification of certain anterior or antecedent rights which might be supposed to appertain to the shares as shares." I think the same observation applies to this. Further on he said (2): "There is, undoubtedly, the case of *In re Espuela Land and Cattle Co.* (3), before Swinfen Eady J. In that case the articles of association provided that in the case of the winding up of the company 'the said preference shares shall be entitled to be paid out of the property and assets of the company the full amount of capital paid up thereon in preference and priority to and before any payment shall be made thereout in respect of the ordinary shares'; and the learned judge decided, amongst a great number of other points, that the insertion of that express right did not deprive the holders of the preference shares of the ordinary right, which they would have had but for those words, to share in what may be called 'excess assets'—that is, assets beyond the amount required fully to replace the capital—but I do not think that the learned judge intended to lay down any absolute canon of construction." Speaking for myself I think Swinfen Eady J. intended, and rightly, to lay down that in the absence of provision to the contrary the shareholders' rights are equal. Further on, referring to the judgment in the *Espuela Case* (3), Sargant J. said (2): "As far as I read his judgment, he deals with preferential dividend and preferential return of capital in the winding up on the same principles, and all that he says is that in the absence of any provision to the contrary the rights of the shareholders are

(1) [1914] 1 Ch. 771. (2) [1914] 1 Ch. 772.
(3) [1909] 2 Ch. 187.

clear. I take that remark as applying to the rights of the shareholders in respect of the dividend as well as in respect of capital; certainly it is founded on a ground common to both sets of rights. That being so, Joyce J. decided (following out logically that canon of construction, on the assumption that it was a right one) in *Will* v. *United Lankat Plantations Co.* (1), that the holder of a share entitled to preferential dividend was entitled, in default of express provision to the contrary, to share with the holders of the ordinary shares in excess dividend beyond the amount of the preferential dividend." I respectfully do not agree that Swinfen Eady J. dealt with preferential dividend and preferential return of capital on the same principles, or that he laid down any such canon of construction as that suggested. The two sets of provisions do not seem to me, for the reasons I have already given, to be in pari materia, and I respectfully suggest that the only safe canon of construction in these cases is to construe each set of provisions strictly in accordance with their respective language and subject-matter. Further on, referring to the decision in the *Lankat Case* (1) in the Court of Appeal, and especially to a passage in Farwell L.J.'s judgment, Sargant J. said (2): "I think he has applied to the rights of preference shares with regard to dividend a canon of construction which is necessarily applicable in the same way to the rights of preference shares in the winding up, if those rights are expressly provided for. Looking at the way in which Swinfen Eady J. dealt with the question of the rights of winding up, as being analogous to the similar rights to dividend while the company is a going concern, and looking to the canon of construction which was applied by the Court of Appeal in *Will* v. *United Lankat Plantations Co.* (1) it appears to me that the weight of authority is in favour of the view that, either with regard to dividend or with regard to the rights in a winding up, the express gift or attachment of preferential rights to preference shares, on their creation, is, prima facie, a definition of the whole of their rights in that respect, and negatives any further or other right to which, but for the specified rights,

(1) [1912] 2 Ch. 571. (2) [1914] 1 Ch. 773.

ASTBURY J. 1919 FRASER AND CHALMERS, LIMITED, *In re.*

they would have been entitled." For the reasons I have already given, I am unable to adopt the view here again expressed and I am unable to find any previous authority in its support. The decision in the *Espuela Case* (1) seems to me to negative it, and I find it difficult to reconcile it with the views expressed by Lord Macnaghten in *Birch* v. *Cropper* (2) and by the Court of Appeal in *Will* v. *United Lankat Plantations Co.* (3) The decision in the *Espuela Case* (1) is a direct authority on the issue I have to decide, and I follow it for the reasons I have given, and I hold that the surplus assets in the present case must be rateably distributed between the ordinary and preference shareholders, and that the costs of this summons must be costs in the winding up.

Solicitors: *Holmes, Son & Pott; Field, Roscoe & Co.; Nisbet, Drew & Loughborough.*

(1) [1909] 2 Ch. 187. (2) 14 App. Cas. 525, 546.
(3) [1912] 2 Ch. 571.

G. R. A.

VALENTINE *v.* HYDE.

ASTBURY J.

1919

Feb. 12, 13, 14, 19, 20, 26; *March* 6.

[1918 V. 344.]

Trade Union—Trade Dispute—Workmen and Workmen—Connected with Employment—All Workmen to join Local Union—Inducing Dismissal of Recalcitrants—Coercion on Employer—Injunction—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3; *s.* 5, *sub-s.* 3.

The immunity conferred by s. 3 of the Trade Disputes Act, 1906, on certain acts done in contemplation or furtherance of a trade dispute does not apply where those acts are coupled with coercion on the employer.

Coercion may exist though no threat is used or warning given; e.g., a determined request by the representatives of a powerful trades union may amount to coercion.

A dispute between workmen and workmen is not a trade dispute within the Act unless it is directly connected with the existing employment or non-employment, terms of employment or conditions of labour of some person. For instance, a demand that a particular workman shall join a local trades union to which practically all his fellow-workmen belong is not necessarily a trade dispute within the Act, though non-compliance with the demand will probably lead to his non-employment in the immediate future.

WITNESS ACTION.

This was an action to restrain the defendants from interfering with the plaintiff's employment.

The plaintiff was a turner in the employment of the Bridgwater Collieries for twenty-four years. He had been a member of the A.S.E., i.e., the Amalgamated Society of Engineers, for thirty-seven years. By rule 20, sub-rule 9, "No person shall be admitted a member who is . . . . a member of another trade society, except such membership of another society be but honorary, or except in the case of associated trades formed for their general protection. . . . . Any member entering any other kindred trade society shall be excluded, and forfeit all he has paid into this society except under special circumstances where permission must be granted by the executive council."

The defendants Hyde and Howard, a boilersmith and blacksmith at the same collieries, were the chairman and secretary of the Walkden branch of the R.V.B., i.e., the

ASTBURY J. 1919 VALENTINE v. HYDE.

Amalgamated Society of Railway Vehicle Builders, Wheelwrights, Carpenters, and Mechanics.

Of the 6000 men employed at the collieries all but the plaintiff and eight others belonged to one of four local unions, namely, the R.V.B. (Walkden branch), the Lancashire and Cheshire Miners' Federation; the Lancashire and Cheshire branch of the Lancashire, Cheshire, and North Wales Enginemen's and Boilermen's Federation; and the Lancashire and Cheshire Colliery Firemen's Association. The plaintiff and two others belonged to the A.S.E., four belonged to an electricians' union, and the remaining two to other unions.

About two years ago a joint council of the four unions was formed and recognized by the employers as representing those unions. The defendants were members of this joint council.

The four unions thought it desirable that all colliery workmen should join one of them, and agreed inter se as to which union each class of workman should join, e.g., a turner would join the R.V.B. (Walkden branch). The A.S.E. had been approached on the subject but no arrangement had yet been made.

On September 1, 1916, the Walkden branch resolved that any man working at the collieries, that is not second to the engineer, "be compelled to come in the union."

On September 28, 1917, the Walkden branch unanimously resolved that the secretary write members of other unions telling them that "they must join our society, or we shall refuse to work with them."

The defendant Hyde had told the plaintiff that the Walkden branch were making this rule, but the plaintiff pointed out that the A.S.E. rules prevented his compliance with it unless he forfeited all his benefits.

On October 3, 1917, the Walkden branch wrote to the plaintiff saying: "In view of the recent award of the Coal Controller granted to our members through the pressure and organizing of our union, it is every worker's interest to join the trades union recognized by the coal owners. We therefore give you a unanimous invitation to join our branch

at Walkden and anticipate your favourable reply before any further action is taken. Awaiting your immediate reply."

This letter was signed by the defendant Howard as secretary.

After this letter Howard asked the plaintiff what he was going to do. The plaintiff replied that he should see his solicitor, meaning the A.S.E. solicitor. He subsequently asked the A.S.E. to let him join the Walkden branch. The A.S.E refused. In March, 1918, he showed the letter of refusal to Hyde, who threatened to get him discharged if he did not join, downing tools if the manager Wallwork was not willing to discharge him.

A similar threat had recently been successful with one Morris. Morris, who was a member of the Blacksmiths' Union and not of the A.S.E., gave in to the threat, and joined the Walkden branch in February, 1918. His case was well known in the works.

On May 23, 1918, the joint council resolved that a note be sent to Wallwork, signed by the four secretaries, to the effect that all weekly wage men "must become members of one of the four unions."

This letter, dated May 30, 1918, and signed by the four secretaries, stated that at a joint board meeting representing the four unions "it was decided to approach you with a request to consider the position of the weekly wage men and any other non-unionist working about the different collieries under your authority, whose wages rise under the different awards that are from time to time secured by the unions above mentioned. We claim that these men ought to belong to one or the other of the respective societies, and should be glad to learn your views respecting this matter."

On June 17, 1918, it was suggested at a joint council meeting that a deputation be appointed to meet Wallwork regarding (inter alia) the letter recently sent to him.

On July 25, 1918, the Walkden branch resolved "that we effect a compromise with the cases of F. Valentine and T. Marsh, who are on the verge of superannuation with their other societies." The plaintiff was not told of this resolution.

On July 29, 1918, a deputation from the joint council,

ASTBURY J. 1919 VALENTINE v. HYDE.

including the defendants, interviewed Wallwork, who in the result agreed that all the men should belong to one of the four unions, and that he would communicate with the plaintiff and others accordingly.

Wallwork was not called as a witness by either side, but it was evident from the statements of the defendants' witnesses that though no threat was made, warning given, or downing tools mentioned, Wallwork thoroughly appreciated the gravity of the position. He said that if the men did not join he would dismiss them by notice.

On August 13, 1918, a joint council meeting was held. The minute states that a discussion regarding the weekly wage men whom Wallwork suggested putting on the staff took place, and the one point definitely arrived at was that "we allow one foreman besides the engineer at each colliery." Putting men on the staff exempts them from union control.

On Monday, September 2, 1918, Wallwork not having communicated with the plaintiff and others since the deputation the Walkden branch resolved that if the A.S.E. men are not made members by Saturday noon "we recommend the manager to carry into effect the arrangement respecting notices," and "that a full statement regarding F. Valentine and T. Marsh be brought before the joint council to see if they could be met in some way or other." The branch were in fact willing to accept the plaintiff as an honorary member at a nominal subscription, but the proposal was apparently not brought to his attention, and nothing came of it.

On September 3 the joint council resolved that the above recommendation be indorsed. The plaintiff's case was not specially mentioned as suggested in the branch resolutions of July 25 and September 2.

The defendants were present at all the above branch and joint council meetings, and were throughout acting together for the Walkden branch.

On September 4 or 5 the defendants told Millington, the assistant manager, that the joint council wished the arrangement of July 29 carried out.

On Thursday, September 5, Millington wrote to the plaintiff

and others as follows: "Re union at Walkden Yard. I am informed by the representatives of the above union that you are not a member, and it is agreed between owners and men that no person must be employed unless he becomes a member. I hereby give you until Saturday morning to conform with the rules."

On Saturday, September 7, a meeting between Millington, the two defendants, and four recipients of the above letter took place. The plaintiff was not present. One recipient asked: "Who are the representatives mentioned in the letter?" Hyde replied: "Myself and Howard." Another asked: "What is the reason for compelling us to join the union?" Hyde replied: "A resolution has been passed that everyone must join one of the four unions." He took the responsibility of giving them a further week for consideration, but said in cross-examination that the joint council were the real people to decide how long they might have, as Millington would understand.

On the same day Millington gave the plaintiff a week's notice. There was no complaint of his work or conduct. He had always received trade union wages, worked trade union hours, and observed trade union conditions.

On September 9, 1918, the plaintiff commenced this action, and his dismissal was subsequently postponed pendente lite.

The plaintiff based his case on illegal coercion of the employer and conspiracy.

In addition to a general traverse the defendants relied on the Trade Disputes Act, 1906. (1)

(1) The Trade Disputes Act, 1906, provides as follows:—

Sect. 1. "An act done in pursuance of an agreement or combination by two or more persons shall, if done in contemplation or furtherance of a trade dispute, not be actionable unless the act, if done without any such agreement or combination, would be actionable."

Sect. 3. "An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills."

Sect. 5, sub-s. 3. "'Trade dispute' means any dispute between employers and workmen, or between workmen and workmen, ... connected with the employment or

ASTBURY J. 1919 VALENTINE v. HYDE.

Sir John Simon K.C., *Barrington-Ward* and *Slesser* for the plaintiff.

First. If the defendants' acts were done in contemplation or furtherance of a trade dispute the plaintiff cannot rely on conspiracy, as in that case s. 1 applies.

But their respective acts, for which both were responsible, clearly amounted to illegal coercion on the employer to discharge the plaintiff: *Pratt* v. *British Medical Association* (1) That is a common law tort: *Quinn* v. *Leathem* (2); *Giblan* v. *National Amalgamated Labourers' Union.* (3) And s. 3 is no defence: *Conway* v. *Wade.* (4)

Secondly. There was no trade dispute within the Act: *Larkin* v. *Long.* (5) There was merely a struggle for an additional member of the Walkden branch. The defendants said the plaintiff must join. The plaintiff refused. That dispute was no more directly connected with the plaintiff's employment or non-employment than if he had refused a request to join the Catholic Church or the Labour Party. The Act is therefore no protection, and the plaintiff can rely on conspiracy as well as on the several illegal acts of the defendants by which he has been so grievously victimized.

Hon. Frank Russell K.C., *Cunliffe K.C.* and *Giveen* for the defendants.

Conspiracy, unless criminal, gives no cause of action: *Cotterell* v. *Jones* (6); *Kearney* v. *Lloyd* (7); *Salaman* v. *Warner* (8); *Sweeney* v. *Coote.* (9)

The gist of the present action is coercion on the employer, and it is essential for the plaintiff to make out a case of undue influence: *Mackenzie* v. *Iron Trades Employers' Insurance Association.* (10)

---

non-employment, or the terms of the employment, or with the conditions of labour, of any person, and . . . . 'workmen' means all persons employed in trade or industry, whether or not in the employment of the employer with whom a trade dispute arises."

(1) [1919] 1 K. B. 244, 261–263.

(2) [1901] A. C. 495.

(3) [1903] 2 K. B. 600.

(4) [1909] A. C. 506, 511.

(5) [1915] A. C. 814.

(6) (1851) 11 C. B. 713.

(7) (1890) 26 L. R. Ir. 268, 280.

(8) (1891) 64 L. T. 598; 65 L. T. 132.

(9) [1906] 1 I. R. 51, 109; [1907] A. C. 221.

(10) 1910 S. C. 79, 84.

It is clear that no threat was made or warning given to Wallwork, and as the plaintiff has not chosen to call him the Court ought not to infer that there was any coercion. His knowledge that the deputation represented powerful trade unions, who could direct a strike if their wishes were not attended to, does not amount to coercion. That kind of pseudo-coercion would exist in every case and render the Trade Disputes Act, 1906, a dead letter.

In the present case the defendants, acting in the interests of themselves, their fellow-workmen and their unions, were perfectly justified in requiring all workmen to join one of the four unions, so as to be united under the joint council, and assuming that there was no coercion on the employer, their acts in furtherance of this object were perfectly legal: *Allen* v. *Flood* (1); *Huttley* v. *Simmons* (2); *Bulcock* v. *St. Anne's Master Builders' Federation* (3); *Santen* v. *Busnach.* (4)

The fact that in legally advancing their own interests they injured the plaintiff is immaterial: *Curran* v. *Treleaven.* (5)

Their considerate attitude towards him is shown by their willingness to accept him as an honorary member, and he has really been victimized by the A.S.E. and not by the defendants.

In *Quinn* v. *Leathem* (6) the defendants were seeking to injure the plaintiff without advancing their own interests.

In *Giblan's Case* (7) they were seeking to make the plaintiff pay a debt.

In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (8) and *National Phonograph Co.* v. *Edison-Bell Consolidated Phonograph Co.* (9) the defendants induced a breach of contract by improper means.

Even if there had been coercion or veiled threats the Trade Disputes Act, 1906, would be a complete defence.

Sect. 3 renders acts of interference with another person's

(1) [1898] A. C. 1.
(2) [1898] 1 Q. B. 181.
(3) (1902) 19 Times L. R. 27.
(4) [1913] Current Digest, 648; 29 Times L. R. 214
(5) [1891] 2 Q. B. 545, 563.
(6) [1901] A. C. 495, 499.
(7) [1903] 2 K. B. 600.
(8) [1905] A. C. 239.
(9) [1908] 1 Ch. 335.

ASTBURY J. 1919 VALENTINE v. HYDE.

employment non-actionable as such, if done in contemplation or furtherance of a trade dispute; e.g., if I write a letter inducing an employer to discharge a servant, I cannot be sued for inducing. If however the letter is libellous I can be sued for libel. But no action lies for the inducing: *Vacher & Sons* v. *London Society of Compositors.* (1) Lord Loreburn's dictum in *Conway* v. *Wade* (2) is based on a misapprehension, as, except in patent cases, threats give no cause of action.

Assuming therefore that there was a trade dispute, the defendants are protected by s. 3.

Now there were here at least three trade disputes:—

1. A dispute between the plaintiff and his fellow-workmen who insisted on making membership of the Walkden branch a term of employment.

2. A similar dispute between the plaintiff and the four unions.

3. A similar dispute between the A.S.E. and the four unions. This is an old-standing dispute, exemplified in *Gibson* v. *Lawson.* (3)

These disputes were directly connected with the employment or the terms of the employment in futuro, and were trade disputes within the Act: *Gaskell* v. *Lancashire and Cheshire Miners' Federation* (4); *Dallimore* v. *Williams.* (5)

The dispute must of course have some conceivable connection with the particular employment. To require miners at a particular colliery to join some special religious or political body would be a requirement absolutely outside the scope of their employment. But to require them to join the local mining union is clearly within that scope, and the defendants' acts in that behalf were justified.

Sir John Simon K.C. in reply.

Cur. adv. vult.

March 6. ASTBURY J. (after stating the facts). The writ

(1) [1913] A. C. 107, 114.
(2) [1909] A. C. 506, 511.
(3) [1891] 2 Q. B. 545.
(4) [1912] Current Digest, 626; 28 Times L. R. 518
(5) [1914] Current Digest, 683; 30 Times L. R. 432.

was issued on September 9, 1918, and the plaintiff's dismissal has been postponed during the currency of the proceedings. After twenty-four years of service, and after paying his trade union subscriptions for thirty-seven years, the plaintiff, at sixty-one years of age, is told in effect by his fellow-workmen: "Unless you sacrifice the benefit of your thirty-seven years' payment and join our union, not because you have not complied with all our conditions of labour, but because we choose to be the judges as to what union you shall belong to, if you work at a colliery where we are in a majority we will obtain your dismissal by your employers, although they have no fault to find with you." The plaintiff was not standing in the defendants' way as to employment, wages or conditions of service, and he and the other handful of men were impotent against the rest of the 6000. But he was nevertheless given two alternatives: to do as he was ordered and be damnified by losing his thirty-seven years' union benefit, or to refuse and be punished by being driven out of his employment. If a free man belonging to a trade union of which he has been a member during the greater part, if not the whole, of his working life, can in this country under the common law or by statute be victimized and injured in this fashion without redress, this action must, of course, fail.

The plaintiff contends in these circumstances that, apart from the Trade Disputes Act, 1906, relied upon by the defendants, the defendants have severally, and conspiring together in combination, unlawfully molested, and threatened to molest, him in disposing of his labour, and interfered, or threatened to interfere, with him in his employment, without justification, and with intent to injure him; and that he has suffered, or will unless the defendants are restrained as prayed suffer, damages thereby. The defendants deny that they have done anything of the kind, and alternatively say that the Trade Disputes Act, 1906, is a complete defence to the action.

I will first deal with the case apart from this statute. The common law right of every man to dispose of his labour as he will, subject to the limitations recognized by law, is too

ASTBURY J. 1919 VALENTINE v. HYDE.

well established to be now questioned, and has been the subject of much litigation and judicial explanation in recent years. In *Rodriguez* v. *Speyer Bros.* (1) Lord Sumner said: "A man validly contracts as he will because he is a free man; he validly disposes of his property as he will because it is his own."

In *Quinn* v. *Leathem* (2) it was held that a combination of two or more, without justification or excuse, to injure a man in his trade is, if damage results, actionable. Lord Macnaghten, after referring to Lord Watson's judgment in *Allen* v. *Flood* (3), said (4): "Obviously Lord Watson was convinced . . . . that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong." Lord Macnaghten concurred in that view, and added (4): "It is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference." He had previously said (5): "In my opinion *Allen* v. *Flood* (6) laid down no new law. It simply brushed aside certain dicta . . . . contrary to principle and unsupported by authority. . . . . The headnote to *Allen* v. *Flood* (6) might well have run in words used by Parke B. in giving the judgment of an exceptionally strong Court, nearly half a century ago: *Stevenson* v. *Newnham* (7)—'An act which does not amount to a legal injury cannot be actionable because it is done with a bad intent.'" Lord Brampton said (8): "In this case the alleged cause of action is very different from that in *Allen* v. *Flood*. (6) It is not dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his

(1) [1919] A. C. 59, 125.
(2) [1901] A. C. 495.
(3) [1898] A. C. 1, 108.
(4) [1901] A. C. 510.
(5) [1901] A. C. 508.
(6) [1898] A. C. 1.
(7) (1853) 13 C. B. 285, 297.
(8) [1901] A. C. 525.

undoubted right, thus described by Alderson B. in delivering the judgment of the Exchequer Chamber in *Hilton* v. *Eckersley* (1): 'Prima facie, it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. . . . .' To this I would add the emphatic expression of the Lord Chancellor, Lord Halsbury, in the *Mogul Case* (2): 'All are free to trade upon what terms they will'; and of Bramwell B., who in *Reg.* v. *Druitt* (3), in a passage quoted by Lord Halsbury in the same case, said: 'The liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body.' Again, Sir W. Erle thus expresses himself (4): 'Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others.' . . . . The remedy for the invasion of a legal right is thus stated by Lord Watson in his judgment in *Allen* v. *Flood* (5): 'Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed.'" Lord Lindley expresses his view as follows (6): "In the opinion of . . . . the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. There being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority . . . . having come to the conclusion that Allen had done no more than I have stated, the majority . . . . held that the action against

(1) (1856) 6 E. & B. 47, 74.
(2) [1892] A. C. 25, 38.
(3) (1867) 10 Cox C. C. 592, 600.
(4) Erle on Trade Unions, p. 12.
(5) [1898] A. C. 92.
(6) [1901] A. C. 532.

ASTBURY J. 1919 VALENTINE v. HYDE.

Allen would not lie; that he had infringed no right of the plaintiffs." Turning then to the facts in *Quinn* v. *Leathem* (1), Lord Lindley said: "As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons . . . . willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of everyone not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him. . . . . Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. . . . . If the above reasoning is correct, *Lumley* v. *Gye* (2) was rightly decided, as I am of opinion it clearly was. Further the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done inten-

(1) [1901] A. C. 495, 534. (2) (1853) 2 E. & B. 216.

tionally to damage a particular individual and actually damaging him. *Temperton* v. *Russell* (1) ought to have been decided and may be upheld on this principle." Later on Lord Lindley says (2): "It was contended . . . . that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action." And later (3): "It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or anyone else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like."

In *Giblan's Case* (4) it was held that two or more, such as officers of a union, with special powers to carry out their design, are not justified in combining to prevent a workman from obtaining employment to his injury, merely with the object of enforcing the payment of a debt. Romer L.J. said (5): "Since . . . . *Quinn* v. *Leathem* (6), I take it to be clear, even if . . . . not . . . . clear before, that a combination of . . . . persons, without justification, to injure a workman by inducing employers not to employ . . . . or continue to employ him, is, if it results in damage to him, actionable. But, although . . . . there is no difficulty in stating the law, ... considerable difficulty may often arise . . . . in ascertaining what is a 'justification' within the meaning of my statement. . . . . On the facts I have simply to determine whether

(1) [1893] 1 Q. B. 715.
(2) [1901] A. C. 537.
(3) [1901] A. C. 541.
(4) [1903] 2 K. B. 600.
(5) [1903] 2 K. B. 618.
(6) [1901] A. C. 495.

ASTBURY J. 1919 VALENTINE v. HYDE. 81 x 3

. . . . persons, who . . . . have special power to carry out their design, are justified in combining to prevent, and in fact preventing, a workman from obtaining any employment in his trade or calling, to his injury, merely because they wish to compel him to pay a debt. . . . . In my opinion they are not justified. . . . . The intent of the defendants was to prevent the plaintiff's obtaining or retaining employment, in order to compel him to pay a debt . . . . ; and from this the intent to injure the plaintiff appears . . . . to follow. But I should be sorry to leave this case without observing that, in my opinion, it was not essential, in order for the plaintiff to succeed, that he should establish a combination of two or more persons to do the acts complained of. In my judgment, if a person who . . . . has power to carry out his design, sets himself to . . . . preventing, and succeeds in preventing, a man from obtaining or holding employment in his calling, to his injury, by reason of threats to or special influence upon the man's employers, or would-be employers, and the design was to carry out some spite against the man, or had for its object the compelling him to pay a debt, or any similar object not justifying the acts against the man, then that person is liable to the man for the damage consequently suffered. The conduct of that person would be, in my opinion, such an unjustifiable molestation of the man, such an improper and inexcusable interference with the man's ordinary rights of citizenship, as to make that person liable in an action. And I think this view is borne out by . . . . *Quinn* v. *Leathem*."(1) It has been suggested by high authority that the accuracy of this last passage would be enhanced if the words "undue influence" be substituted for "special influence." See *Mackenzie* v. *Iron Trades Employers' Insurance Association*. (2) Stirling L.J. said (3): "In . . . . *Mulcahy* v. *Reg*. (4) Willes J. (advising the House of Lords) defined a conspiracy as consisting in the agreement of two or more to do an unlawful act or to do a lawful act by unlawful means. In this case I assume that the defendants agreed to do what they did for a lawful

(1) [1901] A. C. 495.
(2) 1910 S. C. 79, 84.
(3) [1903] 2 K. B. 621.
(4) (1868) L. R. 3 H. L. 306, 317.

object, namely, to obtain payment from the plaintiff of what he owed to the trade union. It must then be made out that they sought to do so by unlawful means. It was contended . . . . that unlawful means must be such as would be wrongful if committed by a single individual: I cannot agree. In *Mogul Steamship Co.* v. *McGregor* (1) Bowen L.J. states the law thus: 'Of the general proposition, that certain kinds of conduct not criminal in any one individual may become criminal if done by combination among several, there can be no doubt. The distinction is based on sound reason, for a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise, and the very fact of the combination may shew that the object is simply to do harm, and not to exercise one's own just rights. In the application of this undoubted principle it is necessary to be very careful not to press the doctrine of illegal conspiracy beyond that which is necessary for the protection of individuals or of the public; and it may be observed in passing that as a rule it is the damage wrongfully done, and not the conspiracy, that is the gist of actions on the case for conspiracy.' This view of the law has been recognized in the House of Lords in the same case on appeal (2), and also in *Quinn* v. *Leathem*." (3) Further on Stirling L.J. said (4): "They did those acts from time to time, as the plaintiff succeeded in obtaining employment, by going to his employer and threatening that they would resort to the powers . . . . vested in them as officers of a trade union, and which involved a resort to the power of numbers in a way which might and probably would cause detriment to the employer. It may . . . . be fairly inferred from the evidence that this course of conduct was intended to be continued until the plaintiff made terms satisfactory to the trade union. Such acts, so persisted in, seem to me to be in the nature of molestation or coercion; and although they do not involve recourse to physical force, I am far from satisfied that they are not . . . . illegal, even if done by a single individual.

(1) (1889) 23 Q. B. D. 598, 616.
(2) [1892] A. C. 25.
(3) [1901] A. C. 495.
(4) [1903] 2 K. B. 623.

ASTBURY J. 1919 VALENTINE v. HYDE.

Fry L.J. . . . . in the *Mogul Case* (1) says: 'It is unlawful and actionable for one man to interfere with another's trade by fraud or misrepresentation, or by molesting his customers, or those who would be his customers, whether by physical obstruction or moral intimidation.' "

It may be difficult or impossible to state affirmatively what amounts to a "sufficient justification" within the meaning of these judgments, but honesty of purpose and absence of malice and illwill towards the injured person do not justify the commission of a tortious or wrongful act. See *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (2) Nor is the fact that the defendants acted with the object of advancing their own trade interests, rather than for the purpose of injuring the plaintiff, any excuse in law for the employment of unlawful means to effect their ends. See *National Phonograph Case* (3) and *Larkin* v. *Long.* (4) "Unlawful means" is another expression which is not easy of exhaustive definition. Providing the method employed to effect a purpose otherwise lawful does not consist of anything beyond a warning, it has been often said that this is unobjectionable in law, but the distinction between coercion in its varied forms, which is unlawful, and a warning, which is not, is a fine one in many cases, and it is a question of fact in each case on which side of the line the action complained of falls. Coercion may vary from threats of physical violence at one end of the scale to moral intimidation or coercive interference at the other, and for the authorities establishing this I would refer to the lucid and exhaustive judgment of McCardie J. in *Pratt* v. *British Medical Association* (5), in which the act of numbers, whose coercive action may be so intolerable as to be actionable, is distinguished from the act of one individual, whose driving force may be negligible.

The plaintiff in this case alleges that the defendants individually have so acted against him as to found a cause of action, and that they have supplied a further element of unlawfulness by the introduction into the acts complained

(1) 23 Q. B. D. 626.
(2) [1905] A. C. 239.
(3) [1908] 1 Ch. 335.
(4) [1915] A. C. 814.
(5) [1919] 1 K. B. 244, 261–263.

of, of the preconcert or conspiracy between themselves and with others of which he complains. [His Lordship reviewed the evidence, including the "covert threat" in Howard's letter of October 3, 1917, and continued:] On May 23, 1918, the joint council resolution was that Wallwork be told in writing that the men "must" join. The politely worded request in the letter of May 30 was considered sufficient to convey to the recipient the sovereign character of the intimation implied therein. At this date the occurrence with regard to Morris was general knowledge in the works, and the resolutions make it clear, and the defendant Howard's evidence prevents there being any doubt that the defendants were engaged in an oppressive combination to injure the plaintiff by exercising their power with the employers to compel them to discharge him if he would not comply with their demands. That they succeeded in attaining their object is plain, and the only question is whether their power to attain their ends was unduly or coercively exercised. Both defendants took part in every relevant resolution of both joint council and branch, and were present at the interview on July 29 and at those in September. At the joint council meeting on September 3 neither of the defendants referred to the wish of the branch, expressed on September 2, that the plaintiff should be spared. It is not difficult to decide, in these circumstances, whether, at the meeting of July 29, the defendants, and those with whom they were acting, merely gave information or warning, honestly believing it to be in the joint interests of their employers and themselves to do so, or whether they exercised coercion. That they appreciated their power is obvious from the evidence and from the difference in language between the joint letter of May 30, 1918, and the resolution in pursuance of which it was written. The same is equally apparent from what took place at the meeting with Millington on September 7. Those who interviewed Wallwork on July 29 were no mere messengers. They were the men at whose word the whole business could have been closed down, and Wallwork was fully alive to the

ASTBURY J. 1919 VALENTINE v. HYDE.

position in which he stood. I can understand that the defendants may have rightly and honestly believed it desirable for the purposes of negotiating and regulating the terms of employment of workmen at the collieries, that the men should act through a joint council elected by their unions, and that the workmen generally should be members of unions represented on the council. But, with the exception of a mere handful of men, this was already the position. The fact that the plaintiff was unable, without great loss to himself, to join the Walkden branch and had refused to do so was wholly immaterial from any relevant point of view to those who controlled practically all the men at the collieries. In other words, as he had throughout complied with the trade union terms recognized by the four unions, his non-joinder was of no consequence to them in so far as their joint scheme and its success was concerned. If Wallwork had been asked to agree for the future that no men should be employed who were unwilling to belong to one of the four unions, their legitimate objects would have been secured. But when the demand was, in the particular circumstances, extended to the plaintiff, with whom the employer had no fault to find, and who had been in his service for so long and whose continuance at his work could in no way injuriously affect the defendants (as is evident on the evidence generally, and in particular from the branch resolutions of July 25 and September 2, 1918), and this demand was acceded to by the manager, the inference which the plaintiff's counsel asked me to draw is irresistible. I feel no doubt that, though no threatening language was made use of to Wallwork, moral intimidation, undue influence and coercive pressure were and must have been employed to obtain the object set out in the various resolutions for which purpose alone this gentleman was interviewed. The defendant Howard has satisfied me by his evidence that what occurred on this occasion can only rightly be so described, however pleasantly the object of the interview was explained to the manager. The latter's only alternative seems to have been to discharge an old servant, against whom no complaint had arisen, if he refused

further to take his orders from the defendants, or to take the unpleasant consequences which a frank and determined deputation appears to have enabled him to appreciate. I cannot conceive that Wallwork, presumably an independent and fair-minded employer, would of his own free will, have treated an old and satisfactory servant as he treated the plaintiff, or as he and Millington, acting under him, did in this case. It is obvious that he was driven to act as he did. He must have known of the Morris occurrence a few months earlier. He knew the power of the deputation, who frankly told him the position, and he knew that they were not merely giving him information as a master for his own good of events that others might bring about if he did not heed their information. The result is that the threats made to the plaintiff amounted to an unlawful interference with the rights of his employer, and the pressure exercised on the employer to an unlawful interference with the rights of his servant.

Before passing to the Trade Disputes Act, 1906, I will refer to some of the arguments used and authorities cited by the defendants on this branch of the case. It is said that this is not a struggle on the part of the defendants' union for an additional member but for the carrying out of a much wider policy. But the letter of May 30, 1918, was based not on any general policy as to wages, labour conditions, employment or non-employment, as to which no question had arisen, but solely on the ground that the plaintiff ought not to have the advantage of the various increases in wage obtained by the joint council without paying subscriptions to one of the unions responsible. It is plain that the defendants intended to make the plaintiff join them, inter alia, for this reason, and I see no difference in principle between steps taken to make a man pay a sum already due and steps taken to compel him to pay future subscriptions to a union that he is unwilling to join. The defendants gave evidence that, in consequence of the plaintiff's exceptional position, they were ultimately willing to accept him as an honorary member on payment of 1*s.* a year. The plaintiff cannot remember being told of this, and, in any case, it would have equally led to his losing

ASTBURY J. 1919 VALENTINE v. HYDE.

his A.S.E. benefit. I am not satisfied that any such proposition was brought to his attention, nor does it seem to be very relevant whether it was or not, or whether the subscription was large or small. Then it is said that if the plaintiff was victimized in being forced to lose the benefit of his thirty-seven years' subscriptions to the A.S.E., as a result of being made to comply with the defendants' demands, this was caused by the A.S.E.'s refusal to consent to his doing so and not by the defendants. This is not convincing, and does not afford any justification for the defendants' conduct. It is next submitted that there is no evidence of conspiracy on the part of the defendants to commit any unlawful act. I have dealt with the evidence of conspiracy ; and the lawfulness or unlawfulness of the act done in pursuance of it depends upon whether coercion or undue influence was made use of in relation to it, upon which I have stated my view of the evidence. It was also argued that it is the plaintiff here who is seeking to prevent the defendants from disposing of their labour as they will, under the influence of the A.S.E. who, when in a majority in similar cases, are said to act in the same way as the four unions. I find no evidence, however, of the plaintiff having sought, by act or word, to do anything of the kind.

The authorities cited by the defendants are numerous, and I will deal only with those mainly relied upon. *Allen* v. *Flood* (1) is said to justify the defendants' contention. I am not of this opinion. In that case, on the facts as accepted by the majority in the House of Lords, there was no question of conspiracy, intimidation, coercion or wrongful interference with the rights of the plaintiff at all. Lord Watson stated (2) that the invasion of civil rights was an actionable wrong, whether promoted by motives, good, bad or indifferent ; and later on (3) he states the law in a way amply sufficient to justify the plaintiff's contention in the present case.

In *Huttley* v. *Simmons* (4) it was held that there was no evidence against any of the defendants except one, and no

(1) [1898] A. C. 1.
(2) [1898] A. C. 92.
(3) [1898] A. C. 96.
(4) [1898] 1 K. B. 181.

evidence of any contractual relation between the plaintiff and the employer in question. Further, no element of coercion seems to have been proved or accepted by the judge.

In *Santen* v. *Busnach* (1) the facts stated in the body of the report in many respects resemble those in the present case; but the Court held that the defendants had nothing to do with any decision to strike and that they only gave the employer information as to the views of his workmen and their probable action; that this was a warning, and nothing more, by men acting as messengers only. Further, there was no charge of conspiracy and no evidence of breach of contract or other wrongful act.

Lastly it is said, citing *Cotterell* v. *Jones* (2) and *Kearney* v. *Lloyd* (3), that no action will lie for a conspiracy to do a thing that would not be actionable if done by one. This has been dealt with in the cases that I have already referred to, but the present plaintiff is not concerned to deny it if he could successfully do so. He is satisfied to rest his case on the evidence that the acts of the defendants severally were wrongful as against him for the reasons I have already dealt with, and, as to the defendants in combination, on the view of the law expounded in *Sweeney* v. *Coote* (4), where FitzGibbon L.J. says: "The decision in *Quinn* v. *Leathem* (5) has settled the law in the case of conspiracy. It reinstated the authority of the *Mogul Case* (6); and the judgments in that case and in *Quinn's Case* (5) are now authoritative expositions of that law. The last cases upon the subject are the *Glamorgan Case* (7) and the *Yorkshire Miners' Case.* (8) It is true that several judges, whose opinions I do not venture to criticise, have said that an individual may become liable for doing, in conspiracy with others, acts which would not be actionable if done by himself alone. But I respectfully suggest that this dangerous doctrine will be found to rest in every instance upon the introduction into the transaction, by the fact of

(1) [1913] Current Digest, 648; 29 Times L. R. 214.
(2) 11 C. B. 713.
(3) 26 L. R. Ir. 268.
(4) [1906] 1 I. R. 51, 109; [1907] A. C. 221.
(5) [1901] A. C. 495.
(6) [1892] A. C. 25.
(7) [1905] A. C. 239.
(8) [1905] A. C. 256.

ASTBURY J. 1919 VALENTINE v. HYDE.

agreement, of an element of unlawfulness which would not otherwise exist. The fact of combination, the mode of combining, and the effect of concerted action, may and often do supply evidence of malice, or of undue pressure and even intimidation; and the combination often produces damage, which is of the gist of the action and which the act of an individual could not produce." On the first branch of the case, therefore, I am of opinion that the plaintiff's contention, as stated earlier in this judgment, has been made out.

I will now turn to the Trade Disputes Act, 1906, on which the defendants alternatively rely. They say that there were three trade disputes in existence, namely: (1.) between the plaintiff and the defendants; (2.) between the plaintiff and the four unions; and (3.) between the A.S.E. and the four unions; and that the acts complained of were done by the defendants in contemplation or furtherance of these disputes, or some or one of them, and are therefore not actionable under and by virtue of s. 3. The plaintiff says that no trade dispute within the meaning of the Act existed at all, and, alternatively, that, coercion being established, s. 3 does not apply. These questions, especially in the troublous times through which we are passing, are of considerable importance, and the true construction and delimitation of ss. 3 and 5 require careful and accurate determination. Prior to the passing of the Act a "trade dispute" had reference to a dispute between employers and workmen. The Act, for the first time, introduced and embraced within the definition disputes between workmen and workmen. But to be a trade dispute within the Act, the dispute must be "connected with the employment or non-employment, or the terms of the employment, or with the conditions of labour," of some person. When the trade dispute is with the employer "workmen" means "all persons employed in trade or industry, whether or not in the employment of the employer." We are not concerned in the present case with disputes between employer and workmen, because none existed, nor are we concerned with disputes between workmen and workmen connected with terms of employment or conditions of labour,

because none arose. The defendants have argued that at the interview on July 29, 1918, the manager agreed that it should be a term of employment at the collieries from that time that all men should belong to one of the four unions, and that in consequence the dispute between them and the plaintiff related to a term of employment within the Act. I cannot agree. The dispute between these parties was long before this interview, and is not within the Act. The difficult question, however, has to be decided, what is a dispute between workmen and workmen as to the employment or non-employment of any person? No such difficulty occurs if the dispute is one between employer and workmen because the employer decides whether he will or will not employ. But as between workmen and workmen the difficulties are great, as the act of volition bringing about the basis of dispute is not the act of either of the disputants, and may be out of the power of either to influence or interfere with. Apart, however, from any difficulty arising on this ground, it is obvious, applying the recognized rule of construction applicable to Acts of Parliament and other written instruments (see *River Weir Commissioners* v. *Adamson* (1)), that in the case of disputes between workmen and workmen some limitation must be placed on the expression "connected with the employment or unemployment of any person." Suppose, for instance, that one workman with some power in that behalf threatened another that, unless he would pay him money, he would get him discharged from his employment. This would be connected with the other's employment in one sense, but would plainly not be a trade dispute within the meaning of the Act. Similarly, if a majority of workmen threatened a minority that unless they joined some political or religious body patronized by the majority, they would bring about a similar result, the same conclusion would follow. A trade dispute within the Act must be a dispute connected directly with employment or non-employment, and not a dispute about some entirely different subject-matter, the non-settlement of which may result in employment

(1) (1877) 2 App. Cas. 743, 763.

ASTBURY J. 1919 VALENTINE v. HYDE.

or non-employment, the existence, terms or conditions of which are not in contest.

In *Conway* v. *Wade* (1) the House of Lords accepted the finding of the jury that a dispute between workmen and workmen whether a man should be forced out of employment if he did not pay a fine to his own union was not a trade dispute within the meaning of the Act.

The report of *Gaskell's Case* (2), relied upon by the defendants, is not easy to follow, and it is difficult to discover what facts were merely pleaded and what were proved. The plaintiffs failed on the facts, it being held that there was no conspiracy, no coercion and no breach of contract. Cozens-Hardy M.R. held that a trade dispute existed, but whether he meant that it existed before the masters were parties to it is not clear. They were parties to it before the issue of the writ, and in any case the decision turned on special facts and does not lay down any principle contrary to *Conway* v. *Wade*. (1)

In my judgment there was no trade dispute in the present case within the Act. The dispute between the plaintiff and the defendants was whether the former would or would not join the Walkden branch. The consequences with which he was threatened, if he refused, formed no part of the subject-matter of the dispute. The fact of his employment, his rate of wages and his conditions of service were not questioned or objected to. The dispute between the plaintiff and the four unions stands on the same footing. The dispute, if it can be so termed, between the A.S.E. and the four unions is still further removed from a trade dispute within the Act, as the employment or non-employment of any person was not even indirectly in question. One of the defendants' witnesses said that this question was one as to the lines of demarcation of membership of unions at collieries, that is, what unions different men should join, and that, no question of wages being involved, it was a question of treaty between the unions.

(1) [1909] A. C. 506.

(2) [1912] Current Digest, 626 ; 28 Times L. R. 518.

If however I am wrong in thinking that the defendants have failed to establish the existence of a trade dispute, there still remains the question whether, assuming one to exist, the defendants are protected under s. 3. This section effects a material alteration in the common law, and ought to be construed strictly. See *Larkin* v. *Long*. (1) The section has been the subject of condemnation in certain quarters outside my province to discuss, but, having regard to the careful language, especially when read in conjunction with s. 5, and to the fact that this has not always been observed in the criticisms made upon it, it is not without importance to determine what it really enacts. It undoubtedly provides that an act done "in contemplation or furtherance of a trade dispute" shall not be actionable "on the ground only" that it induces another person to break a contract of employment or is an interference with the trade, business, or employment of another person, or with his right to dispose of his capital or labour as he wills. It may be that the Legislature thought such acts unavoidable, and perhaps necessary in many situations arising under the complex conditions of present-day trade. But the limitations introduced by the words "in contemplation or furtherance of a trade dispute" and "on the ground only" are real limitations of significant importance. I will only refer to some which have up to the present been the subject of judicial utterance. If the inducement or interference is brought about or caused by acts or conduct otherwise unlawful, no protection is given. See *Conway* v. *Wade*. (2) The words of Lord Haldane in *Vacher's Case* (3) were not intended to convey anything to the contrary. The words "in contemplation or furtherance of a trade dispute" do not cover the case of coercive interference in which the intervener may have in his mind that if he does not get his own way he will take steps to bring a trade dispute into existence. See *Conway* v. *Wade* (4), *per* Lord Shaw. In the same case Lord Atkinson had previously

(1) [1915] A. C. 814, 832, 833.
(2) [1909] A. C. 506, 511.
(3) [1913] A. C. 107, 114.
(4) [1909] A. C. 522.

ASTBURY J. 1919 VALENTINE v. HYDE.

said (1): "It is impossible to suppose, I think, that the Legislature ever intended that where perfect peace prevailed in any factory or establishment, and an intruder, a mere mischief-maker, actuated by greed, or some feeling of revenge, interfered, and by threats and molestation stirred up strife and disputes which neither employer nor workmen theretofore thought of, he should be made irresponsible because of the very mischief he intended and hoped to stir up. On this, the true construction, as I think, of the words 'done in furtherance and contemplation of a trade dispute,' occurring in the third section of the Act of 1906, borrowed as they are from the Conspiracy and Protection of Property Act, 1875 (38 & 39 Vict. c. 86), it would appear to me that there is no inconsistency whatever between the finding of the jury on the first question left to them and their findings on questions 6 and 7. The fact that the defendant, being what he was, interfered in order to compel the plaintiff to pay the old arrears he owed, and also in order to punish him for not paying them, does not, in my view, at all establish that his interference was an act done 'in contemplation of a trade dispute' within the meaning of the statute."

In *Larkin* v. *Long* (2) Lord Sumner suggests but does not express a concluded opinion that even if acts are excusable as done in furtherance of a trade dispute, still, in so far as they are done in furtherance of a dispute to which the Act does not apply, they may stand outside the protection of the Act and, being actionable at common law, be indefensible. Further, the dispute must be one within s. 5, which puts all such disputes as those arising in this and many other cases outside the Act altogether.

The defendants in the present action are excluded from all protection under s. 3 by reason of the unlawful character of the means employed by them in their campaign against the plaintiff, even if they so acted in contemplation or furtherance of a trade dispute, which, in my opinion, they did not.

On this part of the case, therefore, I also hold that the

(1) [1909] A. C. 518. (2) [1915] A. C. 814, 837.

plaintiff's contentions are well founded, and I grant an injunction restraining the defendants and each of them from further wrongfully interfering with the employment of the plaintiff or with his right to dispose of his labour as he wills, and I order them to pay the costs of the action.

ASTBURY J. 1919 VALENTINE v. HYDE.

Solicitors: *Mills, Lockyer & Mills; Burn & Berridge, for James Wilson, Wigan.*

G. R. A.

In re BRITISH SALICYLATES, LIMITED.

ASTBURY J. 1919 *April* 8.

[00144 of 1918.]

Company—Winding Up—Execution—Seizure by Sheriff before Presentation of Petition—Rent paid to Landlord by Sheriff—Claim to be repaid by Liquidator—Landlord and Tenant Act, 1709 (8 *Anne*, *c.* 14 [18 in Rev. Stat.]), *s.* 1—*Companies (Consolidation) Act*, 1908 (8 *Edw.* 7, *c.* 69), *ss.* 139, 140, 142, 211.

Where before the presentation of a winding-up petition the sheriff has seized under a *fi. fa.* goods of the company and after the presentation of the petition the Court has dismissed a summons for a stay of proceedings under the *fi. fa.*, it is the duty of the sheriff to proceed with the execution pursuant to the provisions of the Landlord and Tenant Act, 1709, and pay to the landlord of the premises the amount due for rent of the premises not exceeding one year's arrears. The duty of the sheriff and the right of the landlord in this respect are not affected by the Companies (Consolidation) Act, 1908, imposing general restrictions on the landlord's right to distrain, and the payment by the sheriff of the amount so due for rent to the landlord is a good payment as against the liquidator in the winding up of the company.

SUMMONS.

On July 10, 1918, a writ of fi. fa. issued out of the King's Bench Division at the suit of the plaintiff for a judgment debt of 109*l.* 8*s.* 6*d.* and costs, and on the same day the sheriff seized certain goods, the property of the company on premises at Banner Street, in the City of London. On July 15 a petition was presented to wind up the company. On July 16 the company issued a summons for a stay of proceedings

ASTBURY J.
1919
BRITISH SALICYLATES LIMITED. *In re.*

under the fi. fa. until after the hearing of the winding-up petition. On July 19, after hearing counsel for the plaintiff and the company and the solicitors of the sheriff, the Court dismissed this summons with costs, on the ground that the execution was put in force prior to the presentation of the petition. On July 22 a notice of claim for 62*l.* 10*s.* for a quarter's rent due to the landlord of the premises was served upon the sheriff. On July 23 the sheriff sent to the plaintiff's solicitors a notice informing them of the landlord's claim, and requiring the plaintiff to pay the same. On July 25 the sheriff received the plaintiff's cheque for 62*l.* 10*s.*, and, on July 30 the sheriff paid this sum to the landlord's agents who held a distress warrant for the said rent. On the same day a compulsory order for winding up the company was made, and the goods were sold by the sheriff for 332*l.* 8*s.* 10*d.*, out of which sum the sheriff deducted the amount of the plaintiff's judgment debt and costs and the costs of execution and the sum of 62*l.* 10*s.* in respect of the landlord's rent and paid the balance to the liquidator. The present summons was taken out by the liquidator for an order that the sheriff should pay to the liquidator the sum of 62*l.* 10*s.*, which the liquidator contended was wrongly paid by the sheriff to the landlord.

F. K. Archer for the liquidator. The sheriff was wrong in paying the sum of 62*l.* 10*s.* to the landlord. The Landlord and Tenant Act, 1709 (1), only provides a statutory substitute

(1) Landlord and Tenant Act, 1709, s. 1: "For the more easie and effectual recovery of rents reserved on leases for life or lives term of years at will or otherwise be it enacted by the Queen's Most Excellent Majesty by and with the advice and consent of the lords spiritual and temporal and commons in Parliament assembled and by authority of the same that from and after the first day of May which shall be in the year of our Lord one thousand seven hundred and ten no goods or chattels whatsoever lying or being in or upon any messuage lands or tenements which are or shall be leased for life or lives term of years at will or otherwise shall be liable to be taken by virtue of any execution on any pretence whatsoever unless the party at whose suit the said execution is sued out shall before the removal of such goods from off the said premisses by virtue of such execution or extent pay to the landlord of the said premisses or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the

for the landlord's right to distrain so far as it could be available but for the execution, and, if under the provisions of the Companies (Consolidation) Act, 1908, the landlord is prevented from distraining, the Landlord and Tenant Act, 1709, has no application. The joint effect of ss. 139, 140, 142 and 211 of the Companies (Consolidation) Act, 1908, is to preclude the landlord from recovering his rent accrued prior to the date of the presentation of the petition without leave of the Court: Buckley on Companies, 9th ed., p. 329. The proper course would have been for the landlord to have obtained leave to distrain or take his rent from the sheriff under the Act of 1709, and this was never done.

The effect of the Landlord and Tenant Act, 1709, is stated by Buckley L.J. in *Lewis* v. *Davies* (1), and I rely upon his dicta as showing that the landlord's rights under the Act of 1709 are given only where he would, but for the execution and the goods being in custodia legis, have a presently available right of distress.

The rent was not "due" to the landlord within the provisions of the Landlord and Tenant Act, 1709, and therefore the sheriff could not proceed under that statute. The word "due" in that statute, as elsewhere, means legally recoverable: *In re Moss* (2) *per* Darling J.; *In re Forster*, *Forster* v. *Forster* (3); Oxford English Dictionary, *s.v.* "Due," and having regard to the restrictions imposed by the Companies (Consolidation) Act, 1908, it was not so recoverable by the landlord at the date of the sale by the sheriff. The Landlord and Tenant Act, 1709, therefore affords no protection to the sheriff in making this payment to the landlord, which was a wrong payment as against the liquidator.

---

time of the taking such goods or chattels by virtue of such execution: Provided the said arrears of rent do not amount to more than one year's rent and in case the said arrears shall exceed one year's rent then the said party at whose suit such execution is sued out paying the said landlord or his bailiff one year's rent may proceed to execute his judgment as he might have done before the making of this Act and the sheriff or other officer is hereby impowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money."

(1) [1914] 2 K. B. 469, 475.
(2) [1905] 2 K. B. 307.
(3) [1918 F. 658.] Unreported.

ASTBURY J.
1919
BRITISH SALICYLATES LIMITED, *In re.*

J. H. Stamp for the sheriff. The case is really a simple one. At the date of the presentation of the petition the sheriff was in possession under the execution and the Court refused to interfere with the execution. That being so, it was the duty of the sheriff to proceed with the execution according to law, and under the provision of the Landlord and Tenant Act, 1709, it became his duty to levy the extra sum for the rent due to the landlord. There is nothing in ss. 140, 142 and 211 of the Companies (Consolidation) Act, 1908, to interfere with the sheriff in his performance of the duties imposed by the Landlord and Tenant Act, 1709. Further, under the words of that statute the landlord is entitled to be paid all money due for rent "at the time of the taking of such goods or chattels by virtue of such execution," and the seizure by the sheriff was made some days before the presentation of the petition. *In re Mackenzie* (1) shows that in the case of bankruptcy there is no enactment which affects the special rights of the landlord under the Landlord and Tenant Act, 1709, except in the single case where the execution is itself overridden and rendered void by the bankruptcy.

F. K. Archer in reply. *In re Mackenzie* (1) is distinguishable as under the bankruptcy law the landlord has a right of distress notwithstanding the bankruptcy: Bankruptcy Act, 1883, s. 34; Bankruptcy Act, 1914, s. 35, whereas in liquidation under the Companies (Consolidation) Act, 1908, distress is a proceeding which is restrained unless the Court gives leave to distrain.

ASTBURY J. This is a summons taken out by the official receiver as liquidator of the company for an order that the sheriff pay to the liquidator the sum of 62*l.* 10*s.*, the amount of rent paid by the sheriff to the landlord of certain premises of which the company was lessee under the following circumstances. [His Lordship stated the facts, and continued:] It is now contended on the part of the liquidator that the rent was not due to the landlord within the meaning

(1) [1899] 2 Q. B. 566.

of the Landlord and Tenant Act, 1709, and that the sheriff is therefore liable to repay the sum of 62*l.* 10*s.*, which the liquidator contends was wrongly paid by him to the landlord.

The point is a short but important one, and I am indebted to counsel on both sides for their able arguments. The statute in question provides [his Lordship referred to s. 1 of the Landlord and Tenant Act, 1709, and continued :] That is the section reading it shortly, and it is contended by Mr. Archer first, that the word " due " means legally recoverable, and that the rent was not legally recoverable by the landlord owing to the restrictions on his right of distress contained in the Companies (Consolidation) Act, 1908 ; and secondly, that the Landlord and Tenant Act, 1709, only applies by way of substitution for the landlord's right of distress, and that as the landlord had no such right at the time of the sale by the sheriff the statute has therefore no application. In support of this argument the following passage of Buckley L.J. in *Lewis* v. *Davies* (1) was relied on, where he said : " Sect. 1 of the Statute of Anne is a section which restricts and affects a legal right to distrain," and it is argued that by reason of the restrictions contained in the Companies (Consolidation) Act, 1908, there was no right in the landlord at the material date to distrain without leave. I have also been referred to an unreported case of *In re Forster*, *Forster* v. *Forster* (2), where the majority of the Court of Appeal, affirming the decision of Sargant J., held that a similar meaning should be given to the word " due " in a will, that is to say, a debt legally recoverable, and adopted the dictum of Darling J. in *In re Moss* (3), where he said : " In my opinion, money can only be said to be due in a legal sense when it can be recovered in an action, and it is impossible to say that there can be anything due under this security when no money can be recovered by any legal process." In my view, however, it is not necessary for me to discuss the facts in *In re Moss* (3), which I have consulted, or those in *In re Forster*, *Forster* v. *Forster* (2), which I have had no opportunity of consulting,

(1) [1914] 2 K. B. 469, 475. (2) [1918 F. 658]. Unreported.
(3) [1905] 2 K. B. 307, 314.

ASTBURY J.
1919
BRITISH SALICYLATES LIMITED, *In re.*

since the present case to my mind really turns on a different point. Here the sheriff had been in possession of these goods from July 10, that is for five days before the presentation on July 15 of the winding-up petition, and on July 19, that is four days after the presentation of the petition, the Court refused to interfere with the sheriff in carrying out that execution, and it is in my view rightly contended on his behalf that the effect of that refusal was to authorize him to proceed with the execution according to law—the law contained in the Landlord and Tenant Act, 1709, that is to say that the execution creditor shall before the removal of the goods pay to the landlord the sum due for rent, not exceeding one year's rent, at the time of taking such goods in execution. It cannot be disputed that on July 10 there was due to and recoverable by the landlord the sum of 62*l.* 10*s.* for rent. It is true that if there had been no execution and if the landlord had done nothing further he would after the winding up have been in a position of some difficulty, and after the date of the winding up would have been prevented from distraining without leave of the Court; but as matters were the sheriff was authorized to proceed with the execution, and he could not proceed with the execution according to law without paying the rent due to the landlord at the date of the seizure and thereby fulfilling the obligations imposed on him by the statute. See *In re Mackenzie* (1), where Lindley M.R. said: "If the sheriff had notice before the goods were removed that rent was due to the landlord, and the sheriff, nevertheless, did not keep the goods on the premises, but sold them without paying the landlord, the sheriff was liable to an action by the landlord for the wrongful removal," and he cites a number of authorities in support of that proposition. In my opinion the liberty to proceed with the execution was a liberty to proceed with the execution according to the law contained in the Landlord and Tenant Act, 1709, under which the sheriff having notice of the landlord's claim was bound to satisfy it in order to avoid the consequences pointed out by Lindley M.R. in the passage of his judgment to which I have

(1) [1899] 2 Q. B. 566, 574.

referred. In my judgment therefore the sum of 62*l.* 10*s.* was rightly paid by the sheriff to the landlord and properly deducted from the proceeds of sale as against the liquidator of the company.

ASTBURY J.
1919
BRITISH SALICYLATES LIMITED, *In re.*

Solicitors for applicant: *Peter Thomas & Clark.*
Solicitors for respondent: *William & T. Burchell.*

A. C.

In re JEWELL'S SETTLEMENT.

WATTS *v.* PUBLIC TRUSTEE.

[1918 J. 229.]

RYOUNGE J.
1918
Oct. 17, 24, 25.
1919
April 16.

Settlement—Life Policy—Covenant by Husband to maintain—Lapse of Policy owing to Husband's Default—Right of Trustees to impound Husband's Interest under Settlement.

By marriage settlement made in 1895 a policy of assurance on the husband's life was assigned by him to the plaintiff trustees upon trust on the husband's death to receive the moneys thereby assured, and to pay the income thereof to the wife during her life and after her death to hold the same in trust for the issue of the marriage as the husband and wife should jointly appoint, or in default, then as the survivor should by deed or will appoint, and in default of appointment then in trust for the children of the marriage who being sons should attain twenty-one or being daughters attain that age or marry; and the wife thereby assigned certain reversionary property (described as the wife's fund) to the trustees upon trust to receive the same when it should fall into possession and to pay the income thereof to the wife during her life and after her death to the husband during his life and after the death of the survivor to hold the same upon the same trusts as were declared concerning the policy moneys after the death of such survivor in favour of the issue of the marriage. And the husband thereby covenanted with the trustees that he would not suffer anything whereby the said policy should become void or voidable, and would duly pay the premiums for keeping on foot the said policy or any policy effected as thereinafter provided or for restoring the same respectively if the same respectively should have become voidable; and if the said policy or policies should become void would effect a new policy or policies for the amount which would have become payable under the policy so becoming void if the husband had then died; and, after a declaration that it should not be obligatory on the trustees to enforce the covenants by the husband, it was expressly provided that the trustees might in their discretion

YOUNGER J. 1918 JEWELL'S SETTLEMENT *In re.* WATTS *v.* PUBLIC TRUSTEE.

apply the income of the wife's fund towards payment of the premiums or other sums necessary "for keeping on foot or restoring" the said policies or any of them. In 1897 owing to the husband's default in paying the premiums the policy lapsed and became void. The wife died in 1904. There was issue of the marriage one infant son. The husband married again, and in 1905 his life interest in the wife's fund was assigned to the defendant trustees upon trusts in favour of his second wife. In 1917 the wife's fund fell into possession and the plaintiff trustees now claimed the right to effect a policy on the husband's life for the amount of the lapsed policy out of the income of the wife's fund:—

Held, that as a matter of construction the express power conferred on the plaintiff trustees to apply the income of the wife's fund in keeping on foot or restoring the policies did not extend to a lapsed policy.

Held, however, that on general principles of equity neither the husband nor his assignees could take anything out of the wife's fund without first making good to the trust estate the loss occasioned by the husband's default in allowing the original policy to lapse, and that the plaintiff trustees were therefore entitled to retain the income of the wife's fund during the husband's life until a policy upon his life for the amount covered by his covenant had been effected in their names or until there had been retained thereout a sum equal to the surrender value for the time being of the original lapsed policy.

The authorities considered.

ADJOURNED SUMMONS.

The following statement of facts is taken from his Lordship's written judgment:

By an indenture of settlement, dated November 6, 1895, made on the marriage of L. C. R. Duncombe-Jewell (hereinafter called the husband) and of Mary Amy Slaughter (hereinafter called the wife) the husband assigned to the plaintiffs, the present trustees of the settlement, a policy of assurance on his life for 1000*l.* with all bonuses thereon upon trust on his death to receive the policy moneys then to become payable and after investment to stand possessed of the fund in trust to pay the income to the wife during her life for her separate use, and after the death of the survivor of the husband and wife in trust for such one or more of the issue of the marriage and in such manner as the husband and wife should jointly by deed or as the survivor of them should by deed or will appoint, and in default of and subject to any such appointment in trust for all the children or any the child of the marriage who being sons or a son should attain the age of twenty-one years or being daughters or a daughter should attain that

age or marry. Subject thereto the trustees were to hold the fund (hereinafter referred to as the husband's fund) for the husband absolutely. By the same settlement the wife conveyed and assigned to the trustees certain property to which she was entitled in remainder expectant upon the deaths of Amy Slaughter and Charles Slaughter (hereinafter referred to as the wife's fund) upon trust as and when her interest fell into possession to invest and pay the income to the wife during her life and after her death to the husband during his life, and after the death of both to hold the wife's fund and the income thereof upon such trusts after the death of the survivor of the husband and wife as were declared concerning the husband's fund, except that after the death of the survivor of the husband and wife and in default or on failure of children or issue as aforesaid the trustees were to hold the wife's fund, in case (as happened) the wife predeceased the husband, in trust for such person or persons and in such manner as the wife should by will or codicil appoint. And the husband thereby covenanted with the trustees in relation to the policy of assurance that he would not do or suffer anything whereby the said policy of assurance might become void or voidable; and would duly and punctually "pay the annual premium and other sums necessary for keeping on foot the said policy of assurance or any policy or policies effected as hereinafter provided or for restoring the same respectively if the same respectively shall have become voidable; and, in case the said policy shall not be granted or in case the said policy or any policy or policies effected as hereinafter provided shall become void, will effect a new policy or policies of assurance with such office or offices as the said trustees or trustee for the time being shall direct and in their or his names or name on the life of the [husband] in such sum or sums of money as shall be or amount to the sum which would have been payable under the policy or policies not so effected as aforesaid or so becoming void if the [husband] had then died; and will deliver every such future policy and the receipt of every such payment as aforesaid to the said trustees or trustee for the time being;

YOUNGER J. 1918 JEWELL'S SETTLEMENT *In re.* WATTS *v.* PUBLIC TRUSTEE.

and will not do or suffer anything whereby the said trustees or trustee may be prevented from receiving any of the moneys intended to be assured by the said policy or policies respectively"; and after an agreement and declaration that every such new policy and the moneys to become payable under the same should be held and applied upon the trusts and with and subject to the powers provisoes agreements and declarations thereby declared concerning the said subsisting policy and the moneys to become payable under the same: and after the usual clauses protecting the trustees from all liability should any of the policies become void through any means whatever the settlement conferred the following express power upon the trustees: "Provided always and it is hereby agreed and declared that the said trustees or trustee for the time being may if they or he shall in their or his absolute discretion think fit from time to time apply any part of the income of the wife's settlement fund in or towards payment of the annual premium or other the sum or sums of money necessary for keeping on foot or restoring the said policies of assurance or any of them."

Three half-yearly renewal premiums only were paid upon the policy, and these were provided by the wife. In default of payment of the premium, which became due on May 5, 1897, the policy lapsed and became void. The trustees of the settlement had no funds available to keep on foot the policy, and the husband having no property of his own, proceedings to enforce the covenants on his part already set forth would have been fruitless, and they were not taken.

The wife died on May 3, 1904. There was one child only of the marriage, the defendant, Antony Michael Jewell, now an infant of sixteen. By her will the wife gave all her property, certain articles of jewellery excepted, to him on his attaining the age of twenty-one.

In the event accordingly the infant defendant on the death of the husband, his father, and on attaining twenty-one will become absolutely entitled in possession both to the husband's fund and the wife's fund, unless, should he have issue during the husband's lifetime, his interest is defeated in whole

or in part by an appointment by the husband in their favour.

It will be found not unimportant to remember that subject to the possible exercise of this power by the husband the infant defendant's interest in the funds both of the husband and the wife is identical.

Shortly after the death of the wife the husband changed his name to Cameron and intermarried with Janet Sarah Bruce, and on April 18, 1905, assigned his life interest in the wife's fund to her apparently for value. By an indenture of even date that life interest was assigned in turn by Mrs. Cameron to trustees upon trusts under which she is now entitled to the income representing it. The husband takes no interest under that settlement of which the Public Trustee and the defendant Henry Jenner are the present trustees.

Charles Slaughter died on June 6, 1905, Amy Slaughter on August 25, 1917. On her death the wife's fund fell into possession, and the income, amounting approximately to 134*l.* per annum gross under the trusts of the 1895 settlement, became payable to the husband for his life. Then for the first time the trustees had at hand the means of making good the husband's broken obligations in relation to the policy if it was open to them to resort to the fund for that purpose, and they at once intimated their intention, if under the settlement they had the power, to take out a new policy on the husband's life in place of the lapsed policy and apply the income of the wife's settlement fund so far as necessary in payment of the premiums thereon. The evidence shows that there would under the lapsed policy have been assured on December 31, 1917, had it remained on foot, the sum with bonuses of 1437*l.* 10*s.*, and it appears that a policy for that amount with profits could, if the husband's life on examination had proved to be satisfactory, have been effected under a half-yearly premium of as little as 32*l.* 6*s.* 8*d.* The figures will now, having regard to the further lapse of time, require readjustment; but there seems to be no doubt that, possibly in any case and certainly with the assistance of the husband in the matter of medical examination, the income

YOUNGER J. 1918 JEWELL'S SETTLEMENT *In re.* WATTS *v.* PUBLIC TRUSTEE.

of the wife's fund is more than ample to provide the premiums upon any new policy which the husband under his covenant can be required to effect.

The husband has never, so far as I can find, seriously disputed his own obligations in the matter. They appear in effect to have been acknowledged and their breach regretted time and again. Nor do they seem to be open to question. The delay in enforcing them has been due entirely to his own impecuniosity, as the husband has fully appreciated. But he has no longer any personal interest in the wife's fund. All interest of his own he has assigned away, and he appears to feel that his is a divided duty to his son on the one hand and to his second wife—now an invalid—on the other. In these circumstances his response to the trustees, in the first instance, was an offer to take out a policy on his life for the reduced amount of 1000*l.* without profits, submitting himself to examination for the purpose and assigning the policy to the trustees upon the terms that the premiums should be paid by them out of the income of the wife's fund. That these premiums would have been properly so payable if the trustees had been willing to accept the husband's offer as a sufficient compliance with his covenant there can as it appears to me, for a reason to appear later, be no doubt. But the Public Trustee as assignee of the income took the view that no part of that income could as against him be so applied. The trustees of the 1895 settlement were therefore impelled to raise the whole question of their rights, and by this summons they ask, that it may be determined whether they as such trustees are entitled to effect a policy of assurance on the life of the husband in the Royal Exchange Assurance or some other insurance office of repute for the sum of 1437*l.* 10*s.* or some other and what sum and to pay the expenses of so doing and the annual premiums thereon out of the income of the funds subject to the trusts of the settlement.

G. M. T. Hildyard for the summons.

B. A. Hall for the defendants, the trustees of Mrs. Cameron's

settlement. The words of the express power contained in the settlement of 1895 do not cover the position which has now arisen. You cannot "restore" something which is non-existent. That would be to "renew." You must "restore" the thing itself. See the Oxford English Dictionary, s.v. "Restore." The express power only applies to what is voidable, not void. The trustees cannot take out of the fund what is required to renew the policy.

Sheldon for the infant defendant. There is an equity in the trustees to take out of the husband's interest in the wife's fund what is required to satisfy his liability under the same settlement: *In re Weston.* (1) The husband cannot take his interest in his wife's reversionary fund till he has discharged his liability in respect of his own fund. The second wife had full notice of the 1895 settlement. The husband assigned whatever he took under the 1895 settlement subject to the right of the trustees to take out of it whatever was necessary to discharge his obligation to keep up the policy. The assignee took with notice of this liability and knew she must take subject to it. I rely on the broad principle that a cestui que trust in default cannot take any interest till he has made good his default: *In re Weston.* (1) The assignee is in no better position: *Priddy* v. *Rose.* (2) Where a cestui que trust is in default and assigns, the assignee takes subject to the lien of the trustee: *Ex parte Mitford* (3); *Burridge* v. *Rowe.* (4) The principle applies to a cestui que trust whether originally a cestui que trust or one who has become so by assignment. *In re Langham* (5) is a case which goes perhaps a little beyond or against what was decided by your lordship recently in *In re Pain.* (6) Notice stops claims for the future: *Stephens* v. *Venables* (No. 1). (7) So far as relates to the question of construction, the express power contained in the 1895 settlement is not confined to a policy becoming voidable only. The husband is under an obligation to effect

(1) [1900] 2 Ch. 164.
(2) (1817) 3 Mer. 86, 104.
(3) (1784) 1 Bro. C. C. 398.
(4) (1842) 1 Y. & C. Ch. 183, 192.
(5) (1896) 74 L. T. 611.
(6) [1919] 1 Ch. 38.
(7) (1862) 30 Beav. 625.

YOUNGER J. 1918 JEWELL'S SETTLEMENT *In re.* WATTS *v.* PUBLIC TRUSTEE.

a policy and keep it effective. The trustee's express power to restore includes therefore a power to make effective what the husband has covenanted to do, and enables the trustees to effect a new policy in the place of the void policy and to pay the premiums on it out of the income of the wife's fund.

The general equity is that the husband ought not to take any interest under the settlement till he has fulfilled his obligation.

[He also referred to *In re Melton.* (1)]

B. A. Hall in reply. The husband's obligation is not a debt but an obligation to take out a policy. The only claim by the trustees against him is an action for damages, and none has been brought: *In re Rhodesia Goldfields.* (2) There must be a debt to support the principle contended for by the other side: *In re Wheeler.* (3) It is essential that there should be a debt, that it should be payable at once, and that it should be payable to the trustees. *In re Abrahams* (4) shows that the debt must be immediately payable, otherwise trustees cannot retain. They cannot retain as against what is payable in futuro. *In re Bruce* (5) shows it must be a debt, a legal liability. The principle depends on the existence of a legal debt: *In re Smelting Corporation.* (6) There must be an absolute debt, and here there is none.

Cherry v. *Boultbee* (7) is not the foundation of the rule, but an early application of it and leading case. The present is not the case of a debt to the trustees—to the party who is to pay the fund or legacy to the debtor. The principle s laid down by Swinfen Eady J. in *In re Rhodesia Goldfields*, (8), where he says it is well settled and not open to question. Here it is attempted to bring into the deed a principle which does not apply to it. " To increase the general mass of the estate by a contribution of his own " (9) does not

(1) [1918] 1 Ch. 37.
(2) [1910] 1 Ch. 239.
(3) [1904] 2 Ch. 66.
(4) [1908] 2 Ch. 69.
(5) [1908] 2 Ch. 682.
(6) [1915] 1 Ch. 472.
(7) (1839) 4 My. & Cr. 442.
(8) [1910] 1 Ch. 245.
(9) Ibid. 246.

fit this case. The husband's contribution would be premium plus presenting himself for examination. Experienced conveyancers would not insert a clause giving power to trustees if it would be implied without it. There may be a claim for damages: *Brown* v. *Price* (1); *National Assurance Association* v. *Best.* (2) The principle as to damages is laid down in *Le Blanche* v. *London and North Western Ry. Co.* (3)

[He also referred to Encyclopædia of Forms and Precedents, vol. xiii., p. 215, as to the various modes of maintaining settled policies.]

Sheldon commented on the cases cited in reply, and distinguished *In re Smelting Corporation* (4); *In re Abrahams* (5); *In re Bruce.* (6) [He also referred to Judicature Act, 1884, s. 14, and *Howarth* v. *Howarth.* (7)]

Cur. adv. vult.

April 16. YOUNGER J. delivered a written judgment in which he stated the facts, and continued:

At the hearing of the summons it very soon emerged that without the co-operation of the husband these questions were by no means free from difficulty. And the husband's co-operation could no longer be depended on. To the summons he was no party, and divided in duty, as he deemed himself, he refused to say whether or not he would voluntarily submit himself for medical examination or otherwise assist to any extent at all. Yet the case seemed one for adjustment, in view especially of Mrs. Cameron's delicate health and slender means, and an opportunity was accordingly given at the close of the arguments to see whether by negotiation some proper arrangement could be reached. This, however, has been found impossible, and it is necessary at length to determine the questions between the parties strictly.

Mr. Sheldon's first contention on behalf of the infant defendant, had it been well founded, would have resolved

(1) (1858) 27 L. J. (C. P.) 290.
(2) (1857) 2 H. & N. 605.
(3) (1876) 1 C. P. D. 286.
(4) [1915] 1 Ch. 472.
(5) [1908] 2 Ch. 69.
(6) [1908] 2 Ch. 682.
(7) (1886) 11 P. D. 68.

YOUNGER J. 1919 JEWELL'S SETTLEMENT, *In re.* WATTS *v.* PUBLIC TRUSTEE.

all further difficulty. That contention was that the power contained in the settlement enabling the trustees to apply any part of the income of the wife's fund in or towards payment of the premiums "necessary for keeping on foot or restoring the said policies of assurance or any of them" expressly authorizes them, as they seek by the summons to do, themselves to effect a new policy in place of that which has lapsed and thereafter apply the necessary part of the income of the wife's fund in payment of the premiums upon it. In answer to that view it was urged strongly by Mr. Hall on behalf of the trustees of the 1905 settlement that the only policy to which this express power extends is either an actually subsisting policy or one which at the moment is no more than voidable and capable of restoration: a lapsed or void policy is not included, for the word "restoring" in this settlement connotes only the resuscitation of a policy that has become voidable and does not extend to include the effecting of a new policy in place of one which has become void. And a critical perusal of the settlement, coupled with an extensive examination of the books of conveyancing precedents upon the subject, has convinced me that Mr. Hall's answer on this point is complete. In this settlement the distinction between the restoration of a voidable policy and the effecting of a new policy in place of one that has irrevocably lapsed is, I think, clearly maintained, and the draftsman has not thought fit to extend this express power over the wife's income to the "effecting" a substituted policy in place of one which has become void. The well understood form of words operative for this purpose has been omitted from the power; and, when the object of the power is remembered, I think not without reason. For its object and purpose is, I think, clear. It is to enable the trustees while the income of the wife's fund is still payable to her or on her account to apply a competent part of it even without her consent in discharge of a settlement obligation not of herself but of somebody else, namely, the husband. As Mr. Vaizey says at p. 315 of his well-known work on Settlements: "There does not appear to be any justification for payment by the trustees of such

premiums out of income which, under the trusts of the settlement, is payable to some other person than the covenantor." If such power is to be given it must be expressed, and I think clearly expressed, and I agree with Mr. Vaizey in doubting the correctness of some observations in *Darcy* v. *Croft* (1), which might appear to indicate a contrary view. On the construction, therefore, of this express power it seems to me that Mr. Hall's contention is right, and that the trustees and the infant defendant cannot support this summons by reference only to it. The further contention, however, that the presence of this inadequate express power excludes the possibility of implying in the trustees any further or other power in this matter over the income of the wife's fund even after it has ceased to be payable to her, is, I think, destroyed by the success of the first and by the reasoning by which that success was achieved. Because the presence of the power directed as it is to a totally different purpose can, I think, in no way be held to qualify the right or power of the trustees apart from express provision to impound any part of the trust fund payable under the settlement to or on account of the husband in or towards the discharge of a settlement obligation of his own.

Not that I doubt that this express power, even now that the wife's interest in the fund has ceased, may be invoked if necessary or convenient to cover a case expressly within it—and that is the reason for my opinion already indicated that the original objection by the Public Trustee to the husband's first proposal was not well founded—yet even so I am satisfied that the existence of this power cannot in this settlement limit or affect the general powers of the trustees, whatever they may be, to impound any fund of the husband's from whatever source originally proceeding in or towards discharge of his own obligations under the settlement.

What, then, under this settlement, are the powers of the trustees in this matter? Upon this question there is strangely enough a remarkable absence of direct authority.

First of all, however, the trustees are, I think, in a position

(1) (1858) 9 Ir. Ch. Rep. 19.

YOUNGER J. 1919 JEWELL'S SETTLEMENT, *In re.* WATTS *v.* PUBLIC TRUSTEE.

to maintain, and, so far as I can see, successfully maintain, an action against the husband for specific performance of his covenant to effect and deliver to the trustees in place of the original policy which has become void a new policy on his life in the names of the trustees for the amount prescribed by the covenant and in the office directed by the trustees.

Secondly, in my opinion, on the principle of *Hamlin* v. *Great Northern Ry. Co.* (1), followed in *Le Blanche* v. *London and North Western Ry. Co.* (2), the trustees, on application to the husband and refusal or neglect by him to effect such a policy, will themselves be entitled to take out that policy on the principle that when one party to a contract does not perform it the other may do so for him as near as may be and charge him for the expense incurred in so doing.

Now, it is manifest that in either of these cases the premiums actually payable on the policy effected either as a result of the order for specific performance or by the trustees will largely depend upon the possibility of compelling or inducing the husband to submit to medical examination. But, in my opinion, if and so soon as a policy is actually effected under whichever alternative it comes to be effected, the trustees under the express provisions of the clause to which reference has already so copiously been made will thereafter be entitled to apply the income of the wife's fund so far as necessary in paying the premiums upon it, for the reason that the policy so soon as it exists will like that already mentioned be one to which the power directly refers, and the husband's assignees of the income will be entitled only to the surplus not required for these premiums. In the meantime, moreover, the trustees will, for the reasons given in *In re Rhodesia Goldfields* (3), prior to the issue of the policy be entitled to withhold from the assignees of the husband's interest the income in their hands until the amount necessary to meet these premiums has been ascertained.

These observations would suffice for the decision of the case, and, if well founded, would justify the greater part of the order which I propose to make.

(1) (1856) 26 L. J. (Ex.) 20, 22. (2) 1 C. P. D. 286.
(3) [1910] 1 Ch. 239, 247.

But Mr. Sheldon did not ultimately rest his case on any such particular considerations as these. He based it on the general principle that neither the husband nor anyone claiming under him can take anything out of the settled funds here until there has been made good to them that which under the settlement is due from him. It is, of course, clear that by reason of the husband's default the settled funds at this moment stand denuded of a property which at the least is represented by the present value of the lapsed policy. See *Hawkins* v. *Coulthurst.* (1) To that extent, therefore, at the least, says Mr. Sheldon, the trustees are entitled to impound the income of the wife's fund as against the husband and his assignees until by way of compensation to the husband's fund his default in respect thereof has out of that income been made good.

To this contention Mr. Hall's first answer was that the principle invoked is only applicable where there is owing to the fund by the covenantor something in the nature of a debt properly so called: that the principle of impounding such interest has never been extended to the satisfaction of a mere claim by trustees sounding only in damages. The husband has not in this case, as Mr. Hall pointed out, covenanted to pay any premiums to the trustees; he has not covenanted to pay the trustees anything. If he had, Mr. Sheldon's principle would, it was admitted so far as this point was concerned, have applied to the extent of the money unpaid. It has, however, it was urged no application to a claim in respect of moneys unpaid to some third person or to any other default sounding only in damages. I confess that this distinction insisted upon by Mr. Hall does not commend itself to my judgment. It is, however, the fact that in such leading cases on the subject as *Priddy* v. *Rose* (2); *Smith* v. *Smith* (3); *Burridge* v. *Rowe* (4); there was always a debt due to the trustees. It is also true that the statement of the general principle, as, for example, in *Cherry* v. *Boultbee* (5),

(1) (1864) 5 B. & S. 343.
(2) 3 Mer. 86.
(3) (1835) 1 Y. & C. Ex. 338.
(4) 1 Y. & C. Ch. 183.
(5) 4 My. & Cr. 442.

YOUNGER J. 1919 JEWELL'S SETTLEMENT, *In re.* WATTS *v.* PUBLIC TRUSTEE.

is expressed in terms of debt, that in *In re Rhodesia Goldfields* (1) Swinfen Eady J. was at pains to point out that the liability there was in the nature of debt and not of damages, and that in *In re Smelting Corporation* (2) the decision was, inter alia, that, as the unpaid instalments there in question—they were instalments on debenture stock—did not constitute a debt to the company or the trustees, the principle of *Cherry* v. *Boultbee* (3) had no application. On the other hand it has again and again been said that the equity in question does not depend on any refined or technical considerations, but is of general application, and I feel satisfied that this argument of Mr. Hall's would, if accepted, most injuriously curtail the operation of the rule by inventing distinctions which in substance have no existence.

It is true, as he pointed out, that the measure of damage for the husband's failure to pay the premiums was not the amount of the premiums. See *National Association* v. *Best.* (4) But, if it had been, could it be said that the equity of the trustees to impound the husband's fund in satisfaction was to depend upon the accident whether the husband's covenant was to pay the premiums to them or was to pay them direct to the insurance company. The converse distinction taken before Stirling J. in *In re Weston* (5) was brushed aside by him.

But, really, the substance and result of the husband's default in this matter is, as I have said, that a valuable property which he covenanted to bring into settlement has been lost to the trust. It was a policy of insurance. It might have been a house; it might have been a sum of money. If the property which is lost to the settlement by reason of the breach of covenant can be measured in money, why should not the equity to impound extend to the value so lost as much as it would to money covenanted to be paid and left unpaid. I can see no reason on principle why it should not; and, although for other reasons the decision itself does not assist, the case of *Ex parte Theys* (6)—a decision of the Earl of Selborne L.C.,

(1) [1910] 1 Ch. 239.
(2) [1915] 1 Ch. 472.
(3) 4 My. & Cr. 442.
(4) 2 H. & N. 605.
(5) [1900] 2 Ch. 164.
(6) (1884) 25 Ch. D. 587.

Cotton and Fry L.JJ.—I think settles the matter in this sense. In that case six creditors of a company in liquidation assigned their debts for value to H. After assignment the liquidator took out a misfeasance summons against H. asking for 2000*l.* by way of compensation for misfeasance and breach of trust. Six months later an order was made on the misfeasance summons that H. should pay 2000*l.* to the liquidator in respect of his misfeasance. That sum was not paid. In the meantime, and before any order was made, H. assigned for value all the above debts to T. T. applied, after order made, for payment to him of the dividend on the debts assigned, and the liquidator claimed to retain that dividend by way of set off against H.'s 2000*l.* Now, in that case, as was pointed out by Swinfen Eady J. in *In re Rhodesia Goldfields* (1), the claim was for damages for misfeasance, so there was no debt until judgment. That circumstance, however, did not, in the view of the Court of Appeal, affect the operation of the rule. The rule did not apply there because, but only because, there was no debt established against H. until after his transfer to T. Had it been so established, or had the company's claim been against the original assignors, then, although that claim sounded only in damages, the set off claimed would have been allowed. Cotton L.J. says this (2): "The appellant also relied on this, that the company could say to Hütter, 'you shall not receive anything from the assets till you have paid what you owe us.' Probably the company could effectually say so. But Hütter is not coming here to claim anything from the company. Theys is coming to have the benefit of proofs made not by Hütter but by persons who, though they have transferred the benefit of their proofs, are the persons to whom the debts have been found due. The appellant says that an equity attached to these debts in respect of Hütter's liability to the company, because the debts were assigned to him. The answer to that is that Theys is not coming here to enforce any right of Hütter, but the rights of the creditors who proved. It is said that the Judicature Act, 1873, s. 25, sub-s. 6, makes

(1) [1910] 1 Ch. 239, 242. (2) 25 Ch. D. 593.

YOUNGER J. 1919 JEWELL'S SETTLEMENT, *In re.* WATTS *v.* PUBLIC TRUSTEE.

a difference. No doubt that enactment makes the assignment of a chose in action carry the right for the assignee to sue in his own name subject to equities. But there is nothing to prevent the ultimate assignee from suing in the name of the original creditors, free from any equities which only attach on the intermediate assignee. If there were any equity against the original creditors the case would be different." That judgment as well as those of the Earl of Selborne L.C. and Fry L.J. make it clear, I think, that in the application of the equity now in question there is no magic in the fact that the claim against the covenantor was from the commencement one in debt. A claim for the value of trust property lost through default is just as good for the purpose, and the circumstance that its amount may have to be established, just as the amount of a disputed tailor's bill may have to be established, is no reason, in the one case any more than in the other, why the trustees should be called upon to pay over any income in their hands before the amount of their claim against tbe payee has been ascertained. See *In re Rhodesia Goldfields, Ld.* (1)

Nor do I think that I am precluded from reaching this conclusion by the case of *In re Smelting Corporation* (2) above referred to. In that case there was no debt, but neither was there any damage proved. There was no remedy for specific performance open to the company, and the statement in the judgment that in *In re Abrahams* (3) Warrington J. held that the rule in *Cherry* v. *Boultbee* (4) only applied to a legal debt presently payable, cannot, I think, be pressed. For while that statement sufficed in that case it does not suffice here. In *In re Abrahams* (3) Warrington J. did not decide that the rule only applied to a legal debt presently payable: what he did decide was that it did not apply even to a legal debt which was only payable in futuro—for present purposes a very different thing.

In the result, therefore, while the dicta and general statements so much relied on by Mr. Hall cannot be gainsaid,

(1) [1910] 1 Ch. 239, 247.
(2) [1915] 1 Ch. 472, 477.
(3) [1908] 2 Ch. 69.
(4) 4 My. & Cr. 442.

I do not find that this distinction of his has ever been taken or upheld in a case like the present where the substance of the default was, as I have described it; and fortified as I am by *Ex parte Theys* (1) I am not prepared to weaken a principle of wide utility and broad equity by now upholding the distinction for the first time.

Mr. Hall's second answer to Mr. Sheldon's contention was different. It was based on the decision of Parker J. in *In re Towndrow* (2), to which I was referred since the argument. I cannot see, however, that that decision has any bearing in this case. One may perhaps be permitted to regret, for a reason I ventured to indicate in *In re Pain* (3), that neither in *In re Towndrow* (2) nor in *In re Dacre* (4) was *Morris* v. *Livie* (5) cited to the Court. If it had been, *In re Towndrow* (2) might well have been decided differently, and the principle there enunciated based on broader grounds. But the decision as it stands does not, in my judgment, affect the present case. As I have already pointed out, the interest of the infant defendant here both in the husband's fund and in the wife's fund is the same; and in his interest the trustees, if they can, are bound to see that nothing is taken out of either fund by the husband until his obligations to the other fund are fully fulfilled. *Burridge* v. *Rowe* (6) may also be referred to in this connection.

For all these reasons I am prepared to declare, and do declare, that the applicants are entitled as against the Public Trustee and the defendant Jenner or other the trustees of the settlement of April 18, 1905, to retain the income of the wife's fund during the lifetime of the husband until a policy upon his life for the amount covered by his covenant has been effected in their names or until thereout there has been retained a sum equal to the surrender value for the time being of the original policy which has lapsed.

And further that the applicants are also entitled to apply all accruing income of the said fund so far as necessary in

(1) 25 Ch. D. 578.
(2) [1911] 1 Ch. 662.
(3) [1919] 1 Ch. 46, 47.
(4) [1916] 1 Ch. 344–347.
(5) (1842) 1 Y. & C. Ch. 380, 388.
(6) 1 Y. & C. Ch. 183.

YOUNGER J. 1919 JEWELL'S SETTLEMENT, *In re.* WATTS *v.* PUBLIC TRUSTEE.

payment of the premiums upon such new policy if and when effected.

And further that the defendants as such trustees as aforesaid are not entitled to claim the said income or any part thereof except subject to the exercise by the applicants of their rights therein hereby declared.

Solicitors for plaintiff trustees and infant defendant: *Rawle, Johnstone & Co., for Prance & Prance, Plymouth.*

Solicitors for defendant trustees: *Wansey, Stammers & Co.*

A. C.

P. O. LAWRENCE J. 1919 *April* 8, 9.

In re BARONESS ZOUCHE.

DUGDALE *v.* BARONESS ZOUCHE.

[1918 Z. 281.]

Will—Construction—Bequest of Chattels "at" a House—"Furniture"—"Articles of virtu and curiosities"—Rare Books and Manuscripts—Plate deposited with Bankers for safe Custody.

A testatrix specifically bequeathed "the furniture, pictures, plate, articles of virtu and curiosities at Parham House at the time of my decease":—

Held, that a collection of books and MSS. arranged on shelves running all round a room in the house, called the library, did not as a whole pass under the bequest of the furniture at Parham House.

But *held*, that rare, antique and artistic books and MSS., part of the collection, might pass as articles of virtu or curiosities, and an inquiry was directed.

Held, also, that the above bequest did not include plate which on the letting of Parham House furnished was sent to bankers for safe custody and remained so deposited after the termination of the tenancy and until the death of the testatrix; nor did it include rare books and MSS. lent by her to the British Museum for exhibition and which were still there at her death.

ADJOURNED SUMMONS.

The late Rt. Hon. Darea Baroness Zouche by her will dated September 17, 1914, appointed the defendant Anson and the plaintiff Dugdale her executors and trustees and, after

making divers specific bequests, gave to the defendant Mary Baroness Zouche (in the will called Lady Frankland and hereafter called Lady Zouche) "during her life and after her death to such one of her sons as might succeed to the Parham estate the furniture pictures plate and articles of virtu and curiosities at Parham House at the time of my death," and bequeathed to the trustees of the British Museum for the purposes of such Museum any manuscripts belonging to her lent to the Museum and deposited there at the time of her death. And the testatrix, after bequeathing divers pecuniary legacies, devised and bequeathed all the residue of her estate and effects whether real or personal unto the defendant Anson absolutely.

The testatrix died in April, 1917, and her will was proved by the plaintiff Dugdale alone.

Lady Zouche had two sons who were infants.

Under and by virtue of a settlement made in February, 1873, by the testatrix's father, the 14th Baron Zouche (who died in 1873), and the testatrix's brother the 15th Baron Zouche (who died in 1914), the testatrix was tenant for life of the Parham Estate, which included Parham House, in the county of Sussex, and on her death this property passed under the settlement to the defendant Lady Zouche as tenant in tail thereof, and she subsequently disentailed it.

The testatrix at the time of her death was possessed of numerous articles at Parham House which answered the description of articles of virtu and curiosities, including a valuable collection of arms and armour, Flemish tapestry, and china. She also possessed a large collection of books and MSS. which were kept in a room at Parham House called the library. The books and MSS. were arranged on the shelves of bookcases which were fitted all round the walls of the library but were not fixed to the walls, and some of these articles were of great antiquity and rarity and were extremely valuable. The testatrix was the residuary legatee under the will of her brother, the 15th Baron Zouche, who during his life deposited certain rare books and MSS., which had theretofore been kept at Parham House, at the British Museum for public exhibition,

P. O. LAWRENCE J. 1919 BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

and these articles, together with similar articles lent by the testatrix to the Museum, were left there by her and remained so deposited at her death. The trustees of the Museum were not prepared to accept all the articles bequeathed to them by the testatrix.

The testatrix at the time of her death was also possessed of a large and valuable collection of plate. In 1910 the 15th Baron Zouche let Parham House furnished for a short term, and this plate, which was then at Parham House, was sent by him in eight boxes to Messrs. Hoare, the bankers, for safe custody. The tenancy expired in April, 1914, and after the death of the 15th Baron Zouche in July, 1914, the testatrix lived at Parham House as her country residence. She also had a London residence. In October, 1914, she removed one of the boxes of plate from the bankers, and some of it was used at Parham House and some at the London residence. The other seven boxes remained with the bankers for safe custody.

Lady Zouche claimed that the whole collection of books and MSS. in the library, including those lent to the British Museum and not accepted by the trustees of that institution, passed under the bequest to her of the furniture at Parham House ; or that, at any rate, the rare and valuable books and MSS. passed to her as " articles of virtu and curiosities." She also claimed that the plate deposited for safe custody with the bankers formed part of " the plate at Parham House " bequeathed to her. The plaintiff issued a summons to determine these and other questions.

It appeared from the affidavit of Sir C. M. Barlow, senior partner in the firm of Sotheby, Wilkinson & Hodge, that the library at Parham House was not large and that the books and shelving constituted the principal furnishing of the room. The library consisted of about 5000 volumes many of which were modern and of small value. But there were about 150 extremely choice and valuable books all of great rarity and interest to collectors and all in his opinion properly described as articles of virtu or curiosities. Amongst these was the Mazarin Bible in Latin, printed before August 15, 1456, and the earliest book printed with movable type. The Huth

fine copy of this book was sold in 1911 for 5800*l.* This book and several others were specially curious and interesting, being all printed before 1500, and known to bibliographers and collectors as "Incunabula." These and other valuable books, mainly printed in the 17th and 18th centuries, and some other items and MSS. were of great literary, artistic or historical interest and of great value, and were all sought after by collectors on account of their rarity and also in many cases for special curious and interesting features, such as illuminations, inscriptions of famous writers, etc., and in a good many other cases also for their bindings whether those bindings were original boards, pigskin or vellum, or later artistic bindings of fine quality. The books and MSS. at the British Museum were generally of a similar character as to great rarity and value and of special interest to collectors.

Baden Fuller for the plaintiff.

Jenkins K.C. and *McMullan* for Lady Zouche. The word "furniture" prima facie does not include books but under special circumstances it may do so when chattels are intended to go with the house. The testatrix knew the limitations of the Parham settlement and that at the date of her will Lady Zouche was the tenant in tail in remainder. It is submitted that she intended the library of books to go as heirlooms and that the gift passes all the books. They have in effect been treated as part of the furniture of the house. They have been there ever since they were bought and were left there when the house was let furnished and, if they had been removed, the library with its empty bookshelves would have looked bare and dismantled. In *Ouseley* v. *Anstruther* (1) a bequest of furniture was held to pass a library of books upon a general intention that the house should not be dismantled, and in *Hutchinson* v. *Smith* (2) a bequest of furniture, linen and plate was held to include books. These are decisions on particular wills and are not very satisfactory, and *Manton* v. *Tabois* (3) does not carry the matter any further. But if the

(1) (1847) 10 Beav. 453, 460, 463. (2) (1863) 11 W. R. 417.
(3) (1885) 30 Ch. D. 92, 97.

P. O. LAWRENCE J. 1919 BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

whole library does not pass as furniture, it is submitted that the 150 rare and valuable books and MSS. come within the description of "articles of virtu and curiosities." The expression "an article of virtu" or "vertu" is not used in French or Italian in the same sense as in English, and means "an object of art, antiquity or curiosity": Imperial Dict., iv., 558. In the Oxford English Dict. x., 237 (*c*), it is defined as "a curio, antique or other product of the fine arts," and includes, it is submitted, books and MSS. collected, not for their literary excellence, but because of some quality such as artistic excellence, or antiquity, or rarity, or curious lettering, or because they are interesting as curiosities. There is no direct authority on the point, but in *In re Londesborough* (1) valuable paintings were held not to be "objects of virtu and taste."

[P. O. LAWRENCE J. referred to the definition of "curio" in the Oxford English Dictionary, ii., 1264.]

That is much the same kind of thing as an article of virtu. Here we have both words and these particular articles come within both definitions. Thirdly, as to the plate deposited with the bankers and the books and MSS. not accepted by the trustees of the British Museum, these pass under the specific bequest on the assumption that they were "at Parham House" at the time of the death of the testatrix. The question is whether the words mean the physical position of the articles or the articles belonging to Parham House. The plate was at Parham and was only sent to the bankers for safe custody when the house was let and the books and MSS. were lent for exhibition and would be returned. These chattels did not lose their locality and were "at Parham House" within the meaning of the will, and were only absent for a temporary purpose which might be terminated by the owner of Parham House at any time: *In re Johnston* (2); *Lord Brooke* v. *Earl of Warwick.* (3)

Gavin T. Simonds for the infants adopted the same line of argument. On the last point *Rawlinson* v. *Rawlinson* (4) shows that the physical situation of the chattels is not essential if

(1) (1880) 50 L. J. (Ch.) 9.
(2) (1884) 26 Ch. D. 538.
(3) (1848) 2 De G. & Sm. 425.
(4) (1876) 3 Ch. D. 302; 24 W. R. 946.

they belong to Parham House. With regard to articles of virtu, if that term is capable of a definition which would include these rare and precious books and MSS., then that is the meaning which should be given to it here. On the language of the gifts there is no room for the principle of ejusdem generis. The general intent is to pass the family treasures at Parham House, and these rare and precious articles are some of the greatest treasures at Parham. It is submitted that an article of virtu may be defined to be " an article in respect of which the predominant interest for a man of taste and education lies not in its utility but in its beauty, workmanship, antiquity, rarity, or literary or artistic association." It must be confined to the product of a man's hands, and the object with which the craftsman made it is immaterial. These family treasures fall within that definition. [He also referred to the term " virtuoso " in Florio's Dictionary, 1639.]

Cunliffe K.C. and *Coote* for the residuary legatee. This library of books did not pass as furniture.

[P. O. LAWRENCE J. I will not trouble you on that point.]

Then as to the second point. The library is a miscellaneous collection of books and MSS. None are distinguished by being placed in a separate case. They are placed on the shelves only according to age and size. There is nothing to indicate that the testatrix had any intention as to any particular book or MSS. The house is full of all kinds of objects of art and curios. Who is to decide which of these particular books and MSS. is an article of virtu or a curiosity ?

[P. O. LAWRENCE J. Take the Mazarin Bible as an example.]

It is submitted it is neither an article of virtu nor a curiosity. The word " virtu " implies something in the nature of artistic excellence in the article, but the only value of the Mazarin Bible is that it is one of the earliest Bibles printed. Its rarity is not enough, its antiquity is not enough, there must be also artistic excellence. It is very difficult to give a comprehensive definition of the term " article of virtu."

[P. O. LAWRENCE J. referred to the definition given in the Imperial Dictionary, iv., 558.]

That supports my view that there must be artistic excellence

P. O. LAWRENCE J. 1919 BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

in the article. Then as to the term "curiosity." That suggests something unique or rare in the sense of not being one of many copies but the only one that has been made by the hand of man, or some natural product: Oxford English Dictionary, s. v. "Curiosity" (15.). The fact that the article is an object of interest is not enough, antiquity is not enough, mere historical interest is not enough. The word "curio" was originally applied to Eastern products. There is nothing in the will to indicate that the testatrix intended to break up her library or to include these particular articles in the gift, and it is submitted that they pass under the residuary bequest. Lastly, as to the plate and the articles not accepted by the Museum Trustees. The words "at Parham House" clearly mean the articles at the house at the time of her death unless removed for a temporary purpose: *Heseltine* v. *Heseltine* (1); *Shaftsbury* v. *Shaftsbury*. (2) The testatrix never appropriated the seven boxes of plate to her use at Parham House but left them at the bank, and allowed the articles at the British Museum to remain there.

P. O. LAWRENCE J. The first question I have to decide is, whether the library as a whole passes to Lady Frankland under the bequest to her of furniture. In my opinion it does not. There may be cases in which the word "furniture" ought to be held to include books, but in this case I find nothing in the surrounding circumstances, nor in the will itself, which leads me to come to that conclusion. It is admitted that prima facie the word "furniture" does not denote or include books (much less a library of books such as this) and, in the absence of anything to enlarge the prima facie meaning of the word, I hold that the library does not pass to the legatee of the furniture.

The next question is, what is the meaning in connection with some of the books in the library of the words "articles of virtu and curiosities"? The evidence upon that point is contained in the affidavit of Sir Clement Anderson Montagu Barlow, who states: "The library consists of approximately

(1) (1818) 3 Madd. 276. (2) (1716) 2 Vern. 747.

some 5000 volumes. Of these many are modern and of small value. But there are about 100 to 150 extremely choice and valuable books all of great rarity and interest to collectors and all, in my opinion, properly described as articles of virtu or curiosities." Then he mentions a number of books that he says are specially curious and interesting, being all printed before the year 1500 and known to bibliographers and collectors as "incunabula." Amongst those is the Mazarin Bible, which is the earliest book printed with movable type. It is in two volumes and on paper, and a fine copy of this book was sold by Messrs. Sotheby, Wilkinson & Hodge in 1911 for 5800*l.* There are other valuable books printed in the 17th and 18th centuries, including a Shakespeare edition of 1660. There are also other items of great literary, artistic and historic interest, one of which is "W. Penn's autograph, 1650." The only question I am going to decide on the present occasion is whether a book can be said to be an article of virtu or a curiosity within the meaning of this will. I have taken throughout the arguments, as an example, the Mazarin Bible. Mr. Jenkins and Mr. Simonds have both argued that the meaning of "articles of virtu" (leaving out for the moment the word "curiosities") would include a book such as the Mazarin Bible, that all you have to find in an article in order to make it an article of virtu is that it has some value, or the predominant part of it has some value, other than utility; that is to say, in the case of a book, not the subject-matter it deals with, but the manner in which it is got up, its antiquity or its binding, may give it a special value which would attract persons who are collecting such articles. Mr. Simonds' definition has gone a little further, but I think it is too wide according to my notion of the ordinary acceptation of the term "article of virtu." I think an article, in order to be an "article of virtu," must have some artistic merit; there may be articles which are very rare and which are of great interest to men of taste and education which could not be properly described as "articles of virtu." I think the term connotes that there is an artistic element in the article, and for that reason I have come to the conclusion that if the present case had rested

P. O. LAWRENCE J. 1919 BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

on "articles of virtu" alone, further evidence would be required in order to bring, for instance, the Mazarin Bible within the description of "articles of virtu." If, as is quite possible, the printing is a work of art in itself, so as to give it an artistic merit apart from anything else, it may well be that the Mazarin Bible could come within that description of an "article of virtu." In this case, however, we have the further words "and curiosities." Now, I am quite prepared to accept the definition of "curiosity" in the Oxford English Dictionary; that is to say, a curiosity is an "object of interest: any object valued as curious, rare or strange." Mr. Cunliffe has endeavoured to confine that definition, which I hold to be the ordinary meaning of the word "curiosity," to some kind of article not made by machinery; that is to say, an article which has an intrinsic value owing to its having been manufactured by an individual with his own hands; or, on the other hand, an article which is a natural curiosity, which has not been manufactured or made by any man. I cannot myself draw any such fine distinction. Take the Mazarin Bible again. It is the earliest book printed with movable type, and as such is an object of interest, and an object of interest which would attract to it a value quite apart from any other merits which it might possess, and therefore, in my opinion, the Mazarin Bible is a "curiosity." Then it is suggested by Mr. Cunliffe that I ought not to hold any of the books in the library as included in that gift. He says the books themselves, be they rare or be they of great interest, were books which were kept mixed up with modern books of small value in that library, and as the library itself has not been given as a whole to Lady Frankland, I ought to hold that the rare books are not included in the gift in question. I think that this argument is erroneous. The scheme of the will is to give the articles of virtu and curiosities to Lady Frankland and to give the rest of the articles in the house not specifically disposed of to the residuary legatee. I see nothing in this will to prevent me from holding that these rare books are included in the bequest of "articles of virtu and curiosities," notwithstanding that they were kept with other books which

P. O. LAWRENCE J.

1919

BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

cannot be said to come under that description. On this branch of the summons I make a declaration that the bequest of furniture does not include books or MSS. at Parham House, and that the bequest of articles of virtu and curiosities at Parham House is capable of including some of the books and MSS. at Parham House, and direct an inquiry whether any, and, if so, which, of the books and MSS. at Parham House at the death of the testatrix are articles of virtu or curiosities.

The next two questions which arise are of a different nature. The first relates to certain plate at Hoare's Bank; and the second to certain rare books and MSS. at the British Museum. As regards the plate, the whole of the plate at Parham House at the time of the testatrix's death was given to Lady Frankland. Now there was some plate contained in eight boxes deposited on May 4, 1910, by the then owner of Parham House at his bankers. It was labelled with the address of Parham House, and it was deposited there for safe custody on the letting of Parham House furnished. Parham House was in the occupation of the tenant from 1910 to April, 1914. At the expiration of the tenancy the plate still remained at Hoare's Bank. On July 31, 1914, the then owner died, and the testatrix succeeded to Parham House. She lived at Parham House as her country residence until her death on April 7, 1917. Now from 1910 to 1917 this plate which is in question remained at the bank. The testatrix went to the bank some time in October, 1914, and took away one box of the plate, and some of the contents of this box seem to have gone to her London house and some to Parham House. It is obvious that she knew at the time she succeeded to Parham House, and afterwards, that that plate was at Hoare's Bank and not at Parham House. It is said that although that is so, the plate having been deposited merely by way of safe custody at the bank, it ought to pass, although the words of the will are "at Parham House at the time of my death." Mr. Jenkins has referred me to cases such as *In re Johnston* (1) and *Lord Brooke* v. *Earl of Warwick* (2) as showing that, notwithstanding temporary absence from the house,

(1) 26 Ch. D. 538. (2) 2 De G. & Sm. 425.

P. O. LAWRENCE J. 1919 BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

chattels will pass as being at the house at the time of the death. I agree with the decision in these cases, and if any part of this plate had been sent to a shop for repair at the time of the death, and was only temporarily absent for that purpose, or had been deposited at the bank by the testatrix for a temporary purpose, e.g., while she was absent from town on a visit, there could not be any reasonable doubt but that it would have passed by the gift. But to my mind the facts in this case are wholly different. The testatrix herself did not deposit this plate at the bank. The temporary purpose for which it was originally deposited by her predecessor in title had expired many years before her death. Neither her predecessor nor the testatrix ever fetched the plate away from the bank, and it is a matter of pure speculation what her intention with regard to the destination of the plate would have been if she had ever thought of taking it away from the bank. In my judgment, the testatrix, knowing it was not at Parham House at the time she made her will, did not intend that it should pass by the specific gift in her will unless she brought it to Parham House before she died and it was there at her death. I see no indication whatever in the will of her intending to pass to Lady Frankland anything more than the plate which was at Parham House at the time of her death, and therefore with regard to the plate at the bank I hold that it is not included in the gift of plate to Lady Frankland.

That leaves only the rare books and MSS. at the British Museum, and I think the judgment I have just given with regard to the plate covers the articles which were lent to the British Museum for exhibition purposes. If anything the latter seems to me a stronger case. The predecessor in title of the testatrix lent certain rare books and MSS. to the British Museum for the purpose of exhibition without any limit of time, or anything to indicate that he intended really to have them back again. These articles during the whole time that the testatrix was in possession of Parham House remained at the British Museum, and I hold that they were not at Parham House at the time of her death within the meaning of this specific gift. They therefore pass under the residuary

bequest, and I declare accordingly. I make a similar declaration as regards the books and MSS. which the testatrix herself lent to the British Museum.

P. O. LAWRENCE J.
1919
BARONESS ZOUCHE, *In re.* DUGDALE *v.* BARONESS ZOUCHE.

Solicitors for the plaintiff: *Whitfield, Byrne & Dean.*

Solicitors for the defendants: *Witham, Roskell, Munster & Weld; Carleton-Holmes, Fell & Wade.*

H. L. F.

In re HODGSON'S TRUSTS.

PUBLIC TRUSTEE *v.* MILNE.

[1918. H. 1845.]

PETERSON J.
1919
March 27, 28; *April* 1.

Will—Specific Legacy—Ademption—Order in Lunacy—Mistake—Patient's Banking Account—Appropriation of Payments—Rule in Clayton's Case—Lunacy Act, 1890 (53 *&* 54 *Vict. c.* 5), *s.* 123.

In pursuance of an Order in Lunacy, made under a misapprehension that the patient's current banking account was overdrawn, part of a sum of Consols belonging to the patient and specifically bequeathed by her will, made while she was of sound mind, was sold, and the proceeds of sale, amounting to 1000*l.*, were paid into her account on January 4, 1918. The misconception as to the overdraft arose from the fact that considerable dividends on funds in court belonging to the patient had been overlooked. These were paid to the credit of her account on January 31, 1918, but in the interval the sum of 48*l.* 11*s.* 11*d.* had been drawn out of the 1000*l.* and duly applied by the receiver on behalf of the patient. The patient died on March 27, 1918, her account being then in credit to the extent of 1302*l.* 10*s.* 5*d.*:—

Held, that the specific legatees had no claim in respect of the sum of 48*l.* 11*s.* 11*d.*, which had in fact been applied under the powers of the Lunacy Act, 1890, within the meaning of s. 123; that the rule in *Clayton's Case* ((1816) 1 Mer. 572) did not apply to payments after January 31, which payments were, in the circumstances, attributable to what was strictly income; and that the specific legatees were entitled to the balance of the 1000*l.*

ADJOURNED SUMMONS.

By the joint effect of her will and codicils the testatrix bequeathed the residue of her 2*l.* 10*s.* consolidated stock after payment of certain legacies and the duties thereon

PETERSON J.

1919

HODGSON'S TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MILNE.

to her trustees upon trust for the defendant specific legatees, and she bequeathed the residue of her estate to her trustees upon trusts for the defendant residuary legatees.

After the date of her last codicil the testatrix had a paralytic seizure from which she never recovered, and, being unable to manage her affairs, application was made under s. 116, sub-s. 1 (*d*), of the Lunacy Act, 1890, and by an order of the Master in Lunacy dated April 17, 1917, Julia Caroline Bulkeley was appointed receiver of the estate. At the date of that order a sum of at least 20,000*l.* 2*l.* 10*s.* consolidated stock was standing in the name of the testatrix, and there was also standing to the credit of her current account at the western branch of the Bank of England the sum of 1997*l.* 5*s.* 2*d.* cash, of which the Master in Lunacy ordered 1000*l.* to be lodged in court and invested in 5*l.* per cent. War Loan (which was done), and the balance to be expended by the receiver in payment of the patient's debts, the surplus, if any, to be applied in aid of income. The order also provided that the taxed costs, amounting to 54*l.* 7*s.* 7*d.*, should be paid by sale of a sufficient part of the Consols.

A further order made by the Master in Lunacy, dated November 28, 1917, directed the sum of 1000*l.* and the costs of the application, amounting to 4*l.* 4*s.*, to be raised by the sale of a competent part of the Consols. This was done, and the sum of 1000*l.* cash was on January 4, 1918, paid into the patient's account at the bank, upon which the receiver was entitled to draw.

It appeared from the evidence that the application for this later order and the order itself were made because in November, 1917, the patient's account at the bank was slightly overdrawn, but the order was in fact unnecessary inasmuch as, through inadvertence, the fact had been overlooked that the receiver had not obtained payment of the dividends on the Consols and other funds in court which would have put the patient's account into credit again. These and other dividends which had accrued, amounting in all to 418*l.* 1*s.* 4*d.*, were paid to the receiver on January 30, 1918, and there remained in her hands at the death of the

patient from all sources a sum of 1302*l.* 10*s.* 5*d.*, showing that the sale of the Consols under the order of November 28, 1917, was wholly unnecessary.

The patient died on March 27, 1918, and her will and codicils were duly proved by the plaintiff.

This was a summons for the determination of the question whether the sum of 1004*l.* 4*s.*, the proceeds of sale of the Consols under the later order, and the sum of 54*l.* 7*s.* 7*d.*, the proceeds of the like sale under the earlier order, belonged to the specific legatees of the Consols or to the residuary legatees.

Underhill for the summons.

A. Guest Mathews for specific legatees. The proceeds of sale of the Consols sold under the two orders belong to the specific legatees. So far as the proceeds of sale have not been actually applied under the powers of the Act the sale caused no ademption: Lunacy Act, 1890, s. 123; *In re Palmer.* (1) It is clear on the evidence that the second order for sale of the Consols was made under a complete misapprehension of the circumstances of the case. Even if the sums actually paid under the orders are to be treated as payments made under the powers of the Act, the balance of the proceeds of sale of the Consols sold under the second order remains unaffected. This sum can be traced in the accounts, and should come back to the specific legatees. It is suggested that *Clayton's Case* (2) applies, but the rule in *Clayton's Case* (2) has no application to a case like the present: *In re Wood.* (3)

E. G. Palmer for other specific legatees. I adopt the last argument. No ademption was caused, in the circumstances, by the sale of the Consols: *Attorney-General* v. *Marquis of Ailesbury* (4); *In re Wood.* (3)

The rule in *Clayton's Case* (2) is not applicable. The decisions in *In re Hallett's Estate* (5), *Hancock* v. *Smith* (6), and *The Mecca* (7) proceeded on an intention to appropriate

(1) [1911] W. N. 171.
(2) 1 Mer. 572.
(3) [1894] 2 Ch. 577.
(4) (1887) 12 App. Cas. 672, 688.
(5) (1880) 13 Ch. D. 696, 728, 738.
(6) (1889) 41 Ch. D. 456.
(7) [1897] A. C. 286.

PETERSON J. 1919 HODGSON'S TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MILNE.

on the part of the person who had control of the account, but in this case the receiver under the Order in Lunacy could not exercise an intention to appropriate as against the specific legatees.

J. F. W. Galbraith for residuary legatees. The sum of 54*l.* 7*s.* 7*d.* applied in payment of costs under the first order and the sum of 4*l.* 4*s.* similarly applied under the second order and the sum of 48*l.* 11*s.* 11*d.*, which was actually applied by the receiver, were clearly sums applied under the powers of the Act within s. 123, and the specific legatees can establish no claim in respect of these sums. As regards the balance of the proceeds of sale of the Consols sold under the second order, the proper way of dealing with it is to apply the rule in *Clayton's Case* (1) and to attribute the first payments out to the first payments in and not to the subsequent payments in, the result being to effect an ademption pro tanto. *In re Wood* (2) is distinguishable.

[He also referred to *In re Hallett's Estate* (3) and *Hancock* v. *Smith.* (4)]

P. M. Walters for other residuary legatees supported the same argument.

Cur. adv. vult.

April 1. PETERSON J. This case raises an interesting little point; it has been very well argued on both sides. The conclusion at which I have arrived is that each of the parties is right to a certain extent.

The question arises in this way: There was a lady, Mary Louisa Hodgson, in whose case an order was made in Lunacy, under s. 116 of the Lunacy Act, 1890. It appears that she had made a will and codicils while of sound mind by which she had left all her Consols to certain beneficiaries, and certain of those Consols were dealt with in lunacy. The question now is how much of the proceeds of those Consols is left and what is to happen in respect of the amount so left. Sect. 123, sub-s. 1, of the Lunacy Act, 1890, provides that

(1) 1 Mer. 572.
(2) [1894] 2 Ch. 577.
(3) 13 Ch. D. 696, 728, 738.
(4) 41 Ch. D. 456.

"the lunatic, his heirs, executors, administrators . . . . legatees and assigns, shall have the same interest in any moneys arising from any sale, mortgage, or other disposition, under the powers of this Act which may not have been applied under such powers, as he or they would have had in the property the subject of the sale, mortgage, or disposition, if no sale, mortgage, or disposition, had been made, and the surplus moneys shall be of the same nature as the property sold, mortgaged, or disposed of."

So far, therefore, as the proceeds of sale of the Consols which were sold have not been applied under the powers of the Lunacy Act, they are to be treated as if they were still Consols passing under the specific bequest in the will. The facts are these: On April 17, 1917, there was an Order in Lunacy under which a Miss Bulkeley, who was appointed receiver, was authorized in the name and on behalf of the patient to receive and give a discharge for (*a*) the rents and profits of the freehold and leasehold property to which the patient was entitled, and to manage and let the same, (*b*) all dividends, interest and income, (*c*) the amount belonging to the patient in the hands of Messieurs Hilder, Thompson and Dunn, solicitors, and (*d*) the balance standing to the credit of the patient at the Bank of England, Western Branch, Burlington Gardens, after lodgment of 1000*l.* as thereinafter provided, and then by para. 2 a sum of 850*l.* a year was allowed for the maintenance of the patient. Para. 3 provides for the payment out of the surplus income of the patient certain yearly sums to six named persons, and para. 5 provides that "the receiver is to expend the said balance at the bank in payment of the patient's debts, and any surplus is to be applied in aid of income." That refers to the balance standing to the credit of the patient at the Bank of England after lodgment of the 1000*l.* Then the order directed that the 1000*l.* should be lodged in court and invested in 5*l.* per cent. War Loan, and provided that the taxed costs, which amounted to 54*l.*, should be paid by sale of a sufficient part of the Consols. It was not, and could not be, contended that the proceeds of that sale of Consols had not been applied under the powers

PETERSON J. 1919 HODGSON'S TRUSTS, *In re.* PUBLIC TRUSTEE *v.* MILNE.

of the Act. So far therefore as that amount is concerned, the specific legatees have no claim.

There was a later order of November 28, 1917, by which it was directed that a sufficient amount of Consols should be sold to raise 1004*l.* 4*s.* That sum was raised, and thereout a sum of 4*l.* 4*s.* was applied in paying costs in accordance with the order. The sum of 4*l.* 4*s.* stands on the same footing as the 54*l.* above-mentioned, and there can be no claim by the specific legatees in respect of it.

The order of November, 1917, was obtained in these circumstances: the receiver and her adviser became aware of the fact that there was a small overdraft in November, and they came to the conclusion that there would be no sufficient fund for paying the allowances which had been directed by the Master in Lunacy, and accordingly the matter was brought before the Master in Lunacy. This application was due to a complete misapprehension. There was in fact a sum of about 418*l.* available as income at the time which had been overlooked. There was a small overdraft, but that was due to the fact that the income in question had been overlooked, and if it had been brought in there would have been no ground for the application to the Master in Lunacy, and it was admitted that the order made by him was made under misapprehension. What happened is stated by Mr. Hilder in his affidavit thus: "When I attended the appointment before the Master on the 27th November, 1917, and when he made the order dated the 28th November, 1917, I pointed out that Mrs. Hodgson's income was apparently not sufficient to pay 850*l.* for her maintenance and the allowances directed to be paid by the order of the 17th April, 1917, and suggested that the allowance should be reduced. The Master stated that he did not like to reduce the allowances, and directed them to be continued until after the receiver had passed her first account, when I could apply to him again. I then asked the Master to direct that the 1000*l.* paid into court under the order of the 17th April, 1917, should be replaced and applied as income, and he accordingly made the order of the 28th November, 1917." Under that order, as I have already pointed out, there was a direction

for a sale of sufficient Consols to raise 1000*l.* and 4*l.* 4*s.* The Consols were sold pursuant to that order, and the sum of 1000*l.*, part of the proceeds, was paid into the account of the patient at the Bank of England, on which the receiver was able to draw, and it appears in the pass-book under date January 4, 1918, "1000*l.*" received from the "Royal Courts of Justice." From the pass-book it is clear that up to the end of January, 1918, the 1000*l.* which had been paid in had been in fact drawn upon for the purposes of the payments out which appear on the other side of the account.

On January 31 a sum of 418*l.* 1*s.* 4*d.* in respect of dividends upon the fund in court was received and credited to the account. Up to that date the pass-book shows that a sum of 48*l.* 11*s.* 11*d.* had been drawn out of the sum of 1000*l.* and applied in satisfaction of the payments on the other side of the account. It appears to me therefore that this sum of 48*l.* 11*s.* 11*d.*, part of the 1000*l.*, was in fact applied under the powers of the Act, and stands upon the same footing as the sums of 54*l.* and 4*l.* 4*s.*, and that the specific legatees have no claim in respect of it. The question then remains: What is the position with reference to the balance of the 1000*l.*?

On January 31 the sum of 418*l.* 1*s.* 4*d.*, already referred to, appears on the credit side of the account, and in February and March there appear other receipts, the total since the beginning of January amounting to 1926*l.* 5*s.* 7*d.*, and on the other side of the account the total payments from the beginning of January to the end of March amount to 702*l.* 11*s.* 7*d.*, and therefore it would appear that from the end of January there was ample income in the account for the purposes of meeting current payments. It is said that after the 1000*l.* had been paid in, the only way of dealing with the account is to attribute the first payments out to the first payments in, the result being that the payments out after January 31 would be attributable to the 1000*l.* and not to the 418*l.* 1*s.* 4*d.* or the subsequent payments in during February and March (*Clayton's Case.* (1)).—Now the rule in *Clayton's Case* (1) is a rule based on intention or presumed

(1) 1 Mer. 572.

PETERSON J.
1919
HODGSON'S TRUSTS, *In re.*
PUBLIC TRUSTEE *v.* MILNE.

intention in each case. But the presumption is liable to be displaced by evidence showing that there was no intention that the first payments out should be attributed to the first payments in. See *In re Hallett's Estate* (1) and *The Mecca.* (2)

In the present case the payment in of the proceeds of sale of the Consols was due to a misapprehension of the position, and on the evidence I think that the real application was that as 1000*l.* had been taken out of the patient's banking account under the order of April 17, 1917, for the purposes of investing in the 5*l.* per cent. War Loan, that amount should be restored so that it might be applicable in the same way as if there had been no order for lodgment of 1000*l.* under the order of April 17, 1917. I think that the true inference is that the amount of 1000*l.* was to be replaced as if it had not been taken out of the banking account under the order of April 17, 1917, and that it was in fact to be applied in aid of income which was erroneously supposed to be deficient. From the end of January the income was not deficient, and consequently there was no reason for resorting to the 1000*l.*, which was only applicable in aid of income. As soon as that conclusion is reached the reason for the application of the rule in *Clayton's Case* (3) disappears, and in my opinion the sums paid out after January, 1918, should be attributed to what was strictly income. In respect of the sums of 54*l.*, 4*l.* 4*s.* and 48*l.* 11*s.* 11*d.*, which represent that portion which was in fact applied under the Act, the specific legatees have no claim, but they are entitled to the balance of the 1000*l.* subject to those deductions.

Solicitors: *Hilder, Thompson & Dunn; Murray, Hutchins & Co.; Bell, Brodrick & Gray.*

(1) 13 Ch. D. 696, 728, 738. (2) [1897] A. C. 286.
(3) 1 Mer. 572.

R. M.

In re A Petition of Right of DE KEYSER'S ROYAL HOTEL, LIMITED.

DE KEYSER'S ROYAL HOTEL, LIMITED *v.* THE KING.

C. A.
1918
July 18, 19, 22, 23; October 22; Dec. 3, 17.
1919
Jan. 21, 22, 23; April 9.

[1917 D. 582.]

War—Crown—Royal Prerogative—Defence of the Realm—Right of Crown to take Possession of Land and Buildings without Compensation—Defence Act, 1842 (5 & 6 *Vict. c.* 94)—*Defence of the Realm Consolidation Act*, 1914 (5 *Geo.* 5, *c.* 8), *and Regulations thereunder.*

The Crown is not entitled as of right, either by virtue of its prerogative or under any statute, to take possession of the property of a subject and use it for administrative purposes in connection with the defence of the realm, without paying compensation for its use and occupation.

Upon an examination of the records from a very early period down to the present time, with regard to (*a*) acts of interference by the Crown with private property in land for the purpose of the defence of the realm; (*b*) claims by subjects for compensation in respect of such interference (1.) as a matter of right, (2.) as a matter of grace; and (*c*) the manner in which claims of this nature have been dealt with and the results thereof, it does not appear that the Crown has ever taken the subject's land for the defence of the country without paying for it, nor is there any trace of any claim by the Crown to such a prerogative.

So held by Swinfen Eady M.R. and Warrington L.J. (Duke L.J. dissenting).

Decision of Peterson J. reversed.

In re A Petition of Right [1915] 3 K. B. 649 distinguished.

Appeal from a decision of Peterson J. dismissing a petition of right presented by De Keyser's Royal Hotel Co., Ld., in which they claimed (par. 4) to be entitled as of right to a fair rent for the use and occupation of their premises, of which possession had been taken by the Government for national purposes during the war. The following statement of facts is taken from the judgment of Swinfen Eady M.R.

The suppliants are the owners for a term of years of certain lands, buildings and hereditaments situate on the Thames Embankment near Blackfriars Bridge in the City of London, known as "De Keyser's Royal Hotel." The company had created and issued debenture stock, and by an order of the Chancery Division made on June 25, 1915, Mr. Arthur Francis Whinney, chartered accountant, was appointed receiver

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

of the undertaking, property and assets of the company comprised in the debenture trust deed and to manage the business of the company. Mr. Whinney accordingly carried on the hotel business of the company until possession of the hotel and premises was taken on behalf of the Secretary of State for War as hereinafter mentioned.

On April 18, 1916, the Supplies Division of His Majesty's Office of Works applied to Mr. Whinney by letter and asked at what rent he would be prepared to let the whole of the hotel premises (with the exception of the shops) to that Department for use as offices for the remaining period of the war, and, not improbably, say for a maximum period of three months after the conclusion of peace. There had been an inspection of the property on behalf of the Government and an interview with Mr. Whinney before this letter was written. Mr. Whinney answered, suggesting a rent of 19,000*l.* a year, subject to various conditions fully set forth in his letter. An interview followed on April 28, 1916, between Mr. Whinney and a representative of the Office of Works, at which Mr. Whinney states that he was asked whether he could not make the rent 17,500*l.* The next day a letter was written to Mr. Whinney from the Office of Works stating that the Board were of opinion that it would be to the advantage of all concerned to refer the question of the amount to be paid by the Government for the use of the premises to the Defence of the Realm Losses Commission; and added that in these circumstances the Board had no option but to communicate with the War Office with a view to the hotel premises (excluding the shops) being requisitioned under the Defence of the Realm Acts in the usual manner.

The Defence of the Realm Losses Commission was appointed to inquire and report to the Treasury with regard to claims for direct and substantial loss and damage, "in cases not otherwise provided for," which words have always been held by the Commissioners to exclude all cases where the applicant had or claimed to have any rights enforceable in a court of law under any statutory enactment or under any agreement to which the Crown was party.

On May 1, 1916, Mr. Whinney answered by declining to concur in the suggestion that the amount to be paid by the Government for the use of the hotel should be referred to the Defence of the Realm Losses Commission, but nevertheless offering to facilitate the acquisition of the premises by the War Office and consenting to possession of the premises being given to the authorities' representative (Mr. R. C. Cole) on Monday, May 8, at 11, subject to the consent of the Court (as he was receiver under the Court), which was duly obtained.

The attitude adopted by Mr. Whinney throughout was to give effect to the wishes of the authorities and not to put them to any unnecessary trouble or delay, but to preserve all legal rights. He consented to give possession, and did give possession, to Mr. R. C. Cole, of His Majesty's Office of Works, on May 8, having previously arranged for all the guests to leave the hotel.

There is a further letter of May 1, 1916, from the Lands Branch of the War Office, stating that the Army Council will take possession on May 8 under the "Defence of the Realm Regulations"; also enclosing a form of claim for submission to the Losses Commission, and stating that compensation is made ex gratia, and is strictly limited to the actual monetary loss sustained.

Thus the authorities were given possession on May 8, 1916, and have ever since retained it.

At the trial Sir Charles Ernest Neath, Deputy Quarter-master-General to the Forces, gave evidence that the premises were required for the Air Service, but that when the Air Board was formed the Air Service moved from De Keyser's Hotel to the Hotel Cecil. According to the evidence of Mr. Fane (of the Office of Works), after the Flying Corps left De Keyser's the premises were used by the Government for other sections of the War Office brought from other premises. There is not any further evidence as to the purposes for which these hotel premises are still being used by the Government. Throughout the whole period the premises have been used for administrative purposes, for which they were considered

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

suitable, having regard to the large number of rooms and the lighting and central heating arrangements.

On May 5 Mr. Whinney wrote to the Office of Works, informing them that notice had been given to all the guests of the hotel to leave, and that possession would be given to the authorities on May 8; the letter proceeded as follows: "The loss involved in the closing of the hotel will be very heavy, and I do most earnestly ask the authorities to assist me in minimizing as much as possible by concurring in the steps necessary to fix, and then paying, a fair occupation rent for the premises. I think that a fair rent might be fixed by personal negotiation between the representative of the authority requiring the building and myself, but failing this, I would ask you to agree to submit the question to arbitration. From a single arbitrator, such as the President of the Surveyors' Institute, or Royal Society of British Architects, an award of the fair rental might be expeditiously obtained, and the question of compensation could be left to be dealt with by some other tribunal. As I have to pay a head rent you will, I am sure, appreciate the urgency of fixing an occupation rent without delay. You may rely upon my taking all necessary steps to hand you possession on Monday, and doing everything in my power to facilitate your arrangements."

On May 8, 1916, possession of the hotel was given to Mr. Fane, of the Office of Works, by Mr. Whinney giving him the keys. The same day Mr. Whinney wrote to Mr. A. J. Durrant, the Controller of Supplies, at the Office of Works, informing him of that fact, and enclosing a memorandum of what had been discussed at the interview. Clause 7 of that note is as follows: "H.M. Office of Works do not recognise any claim for occupation rent, and they require that claim for compensation shall be sent in to the Office of Works for transmission to the Duke Commission." (1) Sir Charles Heath stated in evidence at the hearing that he had to determine what premises should be taken, and that he dealt with De Keyser's Hotel; that he knew it was a matter of urgency, and as there appeared to be a prospect of delay he sanctioned

(1) The Defence of the Realm Losses Commission.

the taking over of De Keyser's under the Defence of the Realm Act; but on cross-examination stated that there was no difficulty about possession, and an arrangement could have been made to settle the rent by arbitration afterwards.

Peterson J. held that he was bound by the decision of the Court of Appeal in *In re A Petition of Right* (1) and dismissed the petition. The suppliants appealed.

P. O. Lawrence K.C., *Leslie Scott K.C.* and *Copping* for the appellants.

The suppliants have a legal right to compensation for the use and occupation of their property. Peterson J. in dismissing the petition considered himself bound by *In re A Petition of Right* (1), but that case was analogous to an entry upon land by the sea coast to dig trenches. The aerodrome was required for the defence of the coast against aerial hostilities, and the case has no application to the present, where land and buildings have been taken for purely administrative purposes.

[WARRINGTON L.J. That distinction is only applicable upon the question of the Royal prerogative ?]

Yes. The Crown has no right either by virtue of the prerogative or under any statute to take the property of the suppliants and use and occupy it for such purposes as in the present case without any obligation to make compensation. As regards statutory authority the Crown relies upon the Defence of the Realm Acts and the regulations thereunder. But although it may have been necessary for the safety of the realm for the Government to take and occupy the premises, it is not necessary that they should do so without compensation. Under the Defence Act, 1842, and the Defence of the Realm Acts, 1914, which must be read together, the Crown is bound to pay, and the regulations cannot override the Acts; they are only intended to invest the competent authorities with power to exercise the Acts in accordance with law. They were not intended to give any wide authority to the executive to confiscate the subject's property. If

(1) [1915] 3 K. B. 649.

C. A. 1918 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

the regulations go beyond what is necessary for the safety of the realm they are ultra vires.

[WARRINGTON L.J. That point was not taken before this Court in *In re A Petition of Right.* (1)]

No; but it was in the House of Lords, where however the case was compromised.

[WARRINGTON L.J. The answer appears to be that the regulations give power to take the land, and you have to show that there is an obligation on the Crown to pay compensation.]

The regulations derive their validity solely from the Act of 1914; if they go beyond the scope of the Act they are ultra vires. The Act gives no power to confiscate the subject's property even temporarily.

[DUKE L.J. How does what has been done in this case differ from military exclusion from a certain area?]

Widely. The canon of construction to be applied is that laid down by Brett M.R. in *Attorney-General* v. *Horner* (2), and again alluded to by Bowen L.J. in *London and North Western Ry. Co.* v. *Evans.* (3) Lord Davey again deals with it in *Cape Colony Commissioners* v. *Logan.* (4) We also pray in aid what was said by Swinfen Eady M.R. in *Cannon Brewery Co.* v. *Central Control Board (Liquor Traffic).* (5)

Approaching the Act in the light of those authorities it empowers "the making of regulations" by which is meant the regulating of existing powers. The regulations must be for the securing of public safety and the defence of the realm; and even if the wider view contended for by the Crown be taken it cannot be said that public safety or the defence of the realm necessitates the taking of the property of individual subjects without compensation; any regulation therefore which purports to do that is ultra vires, because there is nothing in the Act which says that it may be done. It could not be done except by very clear provisions. The Act may provide for the suspension of restrictions upon the acquisition of land, and it is said that there is such a suspension in sub-s. 2.

(1) [1915] 3 K. B. 649.
(2) (1884) 14 Q. B. D. 245, 256, 257.
(3) [1893] 1 Ch. 16, 28.
(4) [1903] A. C. 355, 363.
(5) [1918] 2 Ch. 101.

The answer to that is that the restrictions there referred to do not affect the right to compensation. They refer to such restrictions as the giving of the requisite notices and matters of that nature. Suspending a restriction is not equivalent to doing away with a right. The right to payment might be suspended but cannot be taken away. The regulations ought to be construed intra vires if possible. If construed in the wide sense contended for by the Crown, namely, as taking away the right to compensation, they are ultra vires.

[Swinfen Eady M.R. Does the defence of the realm justify the taking, without compensation, of property for every branch of the administrative services ?]

In the case of property required for the housing of munition workers the Crown has disclaimed the right to acquire without compensation. It is difficult to see the distinction.

On the question of the prerogative the right is explained in Dicey on the Law of the Constitution, 8th ed., cap. 14, p. 421. See also Allen on the Prerogative (1849), pp. 157, 158. The right to enter upon a man's land in time of war for the purpose of public defence is not confined to the Sovereign ; any member of the public may do it. It is not therefore a prerogative right. It is not disputed that the King, under certain circumstances, may by his officers enter upon the subject's land, but there is no right in the King to dispossess the subject for such purposes as this hotel has been taken for. There is no case, except *In re A Petition of Right* (1), which has gone to the length of deciding that the subject may be dispossessed without compensation. Under the Great Charter no freeman may be disseised without lawful judgment of his peers or by the law of the land. That has been many times confirmed. See 5 Edw. 3, c. 9 ; 28 Edw. 3, c. 3 ; 16 Car. 1, c. 14. It is the same under the common law. See Co. Litt. 115b. ; Blackstone's Commentaries, i., 138, 139. In case of emergency the King and any of his subjects may enter on a man's land for purposes of public defence, but only so long as the emergency lasts. Two instances of this right are referred to in the *Saltpetre Case* (2), namely, the right to enter and make bulwarks or

(1) [1915] 3 K. B. 649. (2) (1606) 12 Rep. 12.

C. A.
1918
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v* THE KING.

trenches for defence of the realm, and the right to pluck down a house in order to stop a fire. But nowhere is it laid down that a man may be ejected from and dispossessed of his property without compensation. The Crown cannot invoke the prerogative when there is a statute providing for compensation: *British Cast Plate Manufacturers* v. *Meredith* (1); Chitty on the Prerogatives of the Crown, p. 49.

In order to give rise to the prerogative right to enter upon the subject's land there must be an immediate and urgent necessity for the acquisition of the land in order to meet the emergency. No such necessity can arise where the same result may be attained by the exercise of existing statutory powers. It is only imminent danger to the country that justifies the exercise of the prerogative: *Rex* v. *Hampden* (2); *The King's Prerogative in Saltpetre* (3); *The Case of the Bankers* (4); Broom's Constitutional Law, 2nd ed., p. 225.

No case of urgency existed here. There were statutory powers which might well have been exercised. There was no impasse at all. The Crown could have had—indeed, did have—immediate possession. The proceedings constitute a deliberate taking of the subject's property for administrative purposes and without recognition of the right to compensation. All that was necessary could have been done under the Defence Act, 1842, and the regulations under the Act of 1914. The Crown is challenged to produce any precedent for the action taken.

In Halsbury's Laws of England, vol. vi., s. 690, p. 448, the existing rights of the executive are summed up.

Sir F. E. Smith A.-G., Sir Gordon Hewart S.-G., Austen-Cartmell, Lowenthal and *Branson* for the Crown.

The question is whether the hotel premises were occupied under the Defence Act, 1842. That is clearly not the case, for none of the conditions necessary under that Act were complied with by either party. The occupation was either under the Defence of the Realm Consolidation Act, 1914, or by virtue of the Royal prerogative.

(1) (1792) 4 T. R. 794. 805, 1159, 1162.
(2) (1637) 3 How. St. Tr. 825, 903, (3) 12 Rep. 12.
(4) (1700) 14 How. St. Tr. 1.

In Dicey on the Law of the Constitution, 8th ed., p. 421, the term "prerogative" is defined "as equivalent to the discretionary authority of the executive." That is the modern description of the prerogative. The doctrine was laid down in *Rex* v. *Hampden* (1); *The King's Prerogative in Saltpetre* (2); and *Hole* v. *Barlow*. (3)

The appellants have challenged the Crown to produce cases where it had even been attempted to take land without compensation. The absence of such authority is in favour of the Crown. No one can doubt that there must have been cases where the Crown has done acts which were injurious to the property of the subject for the safety and defence of the realm. On the other hand there is no case in which a claim by a subject for compensation has been successfully asserted. This is not immaterial if history be looked at. Contests in days gone by were more local, and the idea then was that the loss should lie where it fell. It is a later conception that it should be distributed over the whole community. It must be assumed here, having regard to the fact that the premises were originally required for the Air Service, that they were taken for the safety and defence of the realm, and that therefore the prerogative arose.

The Zamora (4) shows that the statement of the competent authority that the property is required is conclusive.

In *Sheffield Conservative and Unionist Club, Ld.* v. *Brighten* (5) Avory J. held that the decision of the competent military authority by whose order the premises are taken, as to such necessity, provided that he acts reasonably and in good faith, is conclusive.

In all the cases cited in previous arguments the doctrine is laid down that the prerogative arises if the use of the land is necessary for securing the public safety and defence of the realm during the war. That point was considered and discussed in *In re A Petition of Right*. (6) The defence in that case was based on the Defence Act, 1842.

(1) 3 How. St. Tr. 825.
(2) 12 Rep. 12.
(3) (1858) 4 C. B. (N. S.) 334.
(4) [1916] 2 A. C. 77, 106.
(5) (1916) 85 L. J. (K. B.) 1669; [1916] W. N. 277.
(6) [1915] 3 K. B. 649.

C. A. 1918 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. v. THE KING.

It cannot be said that the prerogative does not arise if there is some other means of taking the land. If it is necessary that certain land should be acquired for the safety of the realm the subject is not entitled to insist that it should be acquired in a particular way.

When once it is conceded that the national interest requires that the land should be acquired the prerogative is available for that purpose. Take for example the *Saltpetre Case* (1) and *Rex* v. *Hampden* (*Ship Money Case*). (2)

[SWINFEN EADY M.R. In the *Saltpetre Case* (1) was not the saltpetre paid for ?]

It would not appear so from the report.

In *In re A Petition of Right* (3) Warrington L.J. cites the passage from the *Saltpetre Case* (1): "But when enemies come against the realm to the sea-coast, it is lawful to come upon my land adjoining the same coast, to make trenches and bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land for the defence of the realm, as appears 8 Edward IV. 23."

The view of the Crown is that the property is taken under the prerogative, and under the prerogative there is no right to compensation.

[SWINFEN EADY M.R. The question really arises as to the extent of the prerogative.]

We rely on the dicta in *Hampden's Case* (4), *Saltpetre Case* (1) and *Hole* v. *Barlow* (5), cited by Avory J. in *In re A Petition of Right*. (6)

[SWINFEN EADY M.R. *Hole* v. *Barlow* (5) has been overruled and is no longer law.]

The authorities show (1.) that in times of grave danger the Crown may seize the property of a subject and (2.) that where the danger is proved there is no right to compensation.

The first reference to compensation is in the Act of 1798 (38 Geo. 3, c. 27). The Act is intituled "An Act to enable

(1) 12 Rep. 12.
(2) 3 How. St. Tr. 825.
(3) [1915] 3 K. B. 649, 665.
(4) 3 How. St. Tr. 825, 1194, 1198.
(5) 4 C. B. (N. S.) 334, 345.
(6) [1915] 3 K. B. 649, 652.

His Majesty more effectually to provide for the defence and security of the realm during the present war, and for indemnifying persons who may suffer in their property by such measures as may be necessary for that purpose."

Sect. 10 provides that His Majesty may authorize persons to treat for the use of ground for the public service, who may, in case of refusal or inability of the party to treat, apply to two justices, or deputy lieutenants, to put His Majesty's officers into possession, which they shall do, and direct the sheriff to summon a jury to ascertain the compensation to be paid. The verdict of the jury is to be certified to the Receiver-General of the Land Tax, who is to pay the compensation. No ground is to be taken without the owner's consent, unless the necessity be certified by the Lord-Lieutenant, etc., or in case of actual invasion. The language of that section is wide enough to include permanent acquisition. The statute would be unnecessary if it were confined to temporary acquisition. You cannot justify the prerogative unless you can show imperative necessity.

Sect. 3 of 44 Geo. 3, c. 95, empowers His Majesty to authorize persons to survey and mark out lands and treat either for the absolute purchase thereof for the public service or for the possession or use thereof, during such time as the exigence of the public service shall require.

Sect. 10 provides that lands shall not be taken without the consent of the owners except in case of actual invasion.

Sect. 9 of the Defence Act, 1842 (5 & 6 Vict. c. 94), enables principal officers to purchase lands, etc., and take leases on behalf of the Crown. Sect. 10 gives power to bodies politic and others to treat. Sect. 16 authorizes principal officers to treat with the owners of lands for the absolute purchase thereof. Sect. 18 enables bodies politic to agree for the sale of lands. Sect. 19 contains provisions for assessing the value of the premises where the parties do not agree to treat.

[SWINFEN EADY M.R. They seem to have regarded use and occupation as something different from a lease.]

The kind of interest contemplated is either the acquisition of the fee simple or a lease of the property—not a temporary

C. A. 1918

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

dealing. The statute contemplated that the acquisition would be for a longer period.

[SWINFEN EADY M.R. See the last two lines of s. 16, "for the possession or use thereof during such time as the exigence of the public service shall require."]

You must take the statute as a whole and consider whether it is dealing with the same matter as the prerogative does. It was not, it is submitted, the intention of the Legislature to make any inroad on the prerogative.

Sect. 23 provides that lands are not to be taken for the defence of the realm without the consent of the owners except in certain cases—e.g., unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings or other hereditaments shall be so taken.

The Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63), s. 1, sub-s. 1, shows that the Legislature conceived of possession of land being taken for the purposes of the defence of the realm in exercise of the prerogative, and made provision for the continuance of the possession of the land so occupied on that basis.

To summarize :—

1. There must always be in the case of national defence in every civil community a residuum of power in the executive which will enable it to deal with an emergency.

2. There are innumerable cases in which land has been taken by the Crown for the defence of the realm, and there is no case in the books which suggests that the subject is entitled to enforce in the courts a legal claim for compensation.

The inference is that there is no known right in law to claim compensation, but it is given only as a matter of grace.

If the Crown desired to acquire the fee it is not suggested that the prerogative would apply. In the case of a lease the rent is determined by agreement or by the Commission.

The Defence of the Realm Act, 1914, and the regulations thereunder give larger powers than those founded upon the prerogative.

The Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), confers on the King in Council power during the

continuance of the war "to issue regulations for securing the public safety and the defence of the realm." *Rex* v. *Halliday* (1) affords guidance as to the scope and general character of the regulations. The dicta of Lord Dunedin and Lord Atkinson in that case make it clear that it cannot be successfully argued that the regulations do not contain new powers, but only define the exercise of previously existing powers.

The object of the regulations is the defence of the realm. It is for the executive to determine what is necessary for that. "Those who are responsible for the national security must be the sole judges of what the national security requires": *The Zamora.* (2) In *In re A Petition of Right* (3) this matter is carefully considered. See also *Sheffield Conservative and Unionist Club, Ld.* v. *Brighten* (4); *Lipton, Ld.* v. *Ford.* (5)

The argument used against the regulations is that it cannot be necessary to take land without compensation when it might be taken by paying compensation. All that it is necessary for the Crown to show is that it is entitled to take the land, and that it is for the defence of the realm. When that is done it is for the suppliants to show that they are entitled to compensation. The case for the Crown has always been that there is no legal right to payment but that all payments contemplated under the regulations are ex gratia. In the regulations the King defines the manner in which such ex gratia payments are to be made.

The Defence of the Realm (Acquisition of Land) Act, 1916 (6 & 7 Geo. 5, c. 63), by s. 1, sub-s. 1, makes lawful the continuance of possession after the war of land occupied for the purposes of the defence of the realm. *In re A Petition of Right* (6) had made the possession during the war lawful.

By s. 3 (5.) provision is made for what is to happen after the war.

The result is to show that the Legislature could not have

(1) [1917] A. C. 260, 270, 275.
(2) [1916] 2 A. C. 77, 107.
(3) [1915] 3 K. B. 666.
(4) 85 L. J. (K. B.) 1669; [1916] W. N. 277.
(5) [1917] 2 K. B. 647.
(6) [1915] 3 K. B. 649.

C. A. 1918

DE KEYSER'S ROYAL HOTEL, LD., *In re.*

DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

taken the view that in the case of land acquired for retention after the war the terms on which it should be acquired should be those provided by the Lands Clauses Act.

Under the prerogative the only question is: Is the taking of the land necessary? That is the only condition precedent. If it is then it is for the executive to determine what course it will follow.

Copping in reply. Where, as in this case, statutory provision is made for the taking of the subject's property with compensation, the prerogative right no longer exists.

[DUKE L.J. The Crown is not affected by legislation in the absence of express words to take away the prerogative.]

Generally speaking that is so, but it does not apply to such a case as the present; where power is given by statute to do certain things with certain consequences the Crown cannot proceed in another way. The prerogative only exists (1.) in case of urgent necessity and (2.) where there are no other means of doing what is necessary. The Court is not concerned with expediency or policy where the statute has provided a way of doing it. This property might have been taken under the following statutes: 5 & 6 Vict. c. 94; 8 & 9 Vict. c. 18; 23 & 24 Vict. c. 106; and 54 & 55 Vict. c. 54. There may be a necessity in the interests of public security to take the suppliants' property, but there is no necessity to do so without paying compensation. The suppliants have always admitted the necessity of taking the property, reserving nevertheless their right to compensation. The contention of the Crown that there was power under the prerogative to take the land and chattels of the subject without payment of compensation cannot now be supported. The *Saltpetre Case* (1) is no authority for that proposition.

The Crown was challenged to produce any authority or record of the taking of land without payment, and none have been produced. Search has been made by the suppliants, but no such record has been found. If the prerogative right claimed had existed there would have been no necessity for the Emergency Legislation.

(1) 12 Rep. 12.

The Act of 1916 was referred to by the Attorney-General (6 & 7 Geo. 5, c. 63). That Act provides for the continuation of possession of land occupied under the exercise of any purported prerogative right. See s. 1.

[At the conclusion of the arguments the case was ordered to stand over and be mentioned again on October 22, steps being taken in the meantime to examine the records with regard to instances of interference by the Crown with private property in land for the purpose of the defence of the realm, and claims by subjects for compensation in respect of interference of that nature. The case was accordingly mentioned on October 22 and again on December 3 and 17, the search having proceeded in the meantime, and on each occasion the further hearing was adjourned.]

1919. Jan. 21. The appeal came on for final hearing, and the result of the search was submitted to the Court in the form of a volume of extracts from the records.

Sir John Simon K.C., *Leslie Scott K.C.* and *Copping* for the appellants.

Amongst the documents revealed by the search in the records are ancient statutes passed from time to time when emergency required the acquisition by the Crown of land and other property for the defence of the realm. The history of the right of the Crown to take land for the purposes of national defence has been analogous to the history of the Lands Clauses Acts. From time to time when the country was threatened with invasion statutes were passed, and many of the provisions contained in them were embodied in the Defence Act, 1842. The Crown did not rely on its prerogative, it being always considered essential to take statutory powers for doing what was necessary for public defence.

The first of these statutes was 4 Hen. 8, c. 1, which empowered the justices of the peace to appoint such boroughs and towns as they should think needful to make bulwarks and fortifications for the defence of the south coast of Cornwall, and further empowered all the King's subjects under the

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

direction of the justices to make such bulwarks as should be necessary, and without any manner of payment to be demanded for any of the premises or any manner of action by any one to be maintained against any of the King's subjects for any such matter or cause. The Act was to endure to the next Parliament. [The following Acts were also referred to: 14 Car. 2, c. 20; 22 & 23 Car. 2, c. 23; 1 James 2, c. 11; 4 & 5 W. & M., c. 24; and 11 & 12 Will. 3, c. 13.] There is also a series of statutes from the time of Queen Anne showing that even in time of war it was necessary to appoint commissioners with power to summon juries for the purpose of assessing the compensation to be paid for property taken for public defence. The Act 31 Geo. 2, c. 39, is an example of that kind of legislation.

[SWINFEN EADY M.R. Are there any statutory provisions for compensation apart from absolute purchase?]

Sect. 10 provides for the compensation of the owners of adjoining lands "injuriously affected" by the taking. None of the statutes, nor the commissions under them, reveal any claim by the Crown to a prerogative right to take the subject's property without payment. Other temporary defence Acts were passed in 1761 (2 Geo. 3, c. 37); 1763 (4 Geo. 3, c. 35); 1780 (20 Geo. 3, c. 38); 1798 (38 Geo. 3, c. 27); 1803 (43 Geo. 3, c. 55); and 1804 (44 Geo. 3, c. 95). These temporary Acts were finally consolidated by the Defence Act, 1842 (5 & 6 Vict. c. 94).

[Counsel then commented on a large number of Ordnance Minutes and War Office Records contained in the Book of Extracts above referred to.] None of these documents show any right in the Crown to take property without paying for it. [A series of documents embodied in the Extracts was then referred to relating to grants by the Crown, by virtue of its prerogative, of licences to search for and get saltpetre for the manufacture of gunpowder. These grants were made before the abolition of monopolies by the Act 21 James 1, c. 3.]

It is submitted that when there is a statutory power to occupy land upon paying compensation, such as is provided

in this case by the Defence Act, 1842, there is no necessity for the Crown to take it otherwise.

[WARRINGTON L.J. referred to Brooke's La Graunde Abridgment, Prerogative le Roy, No. 18.]

It is submitted with regard to the documents revealed by the search and now before the Court, although most of the precedents for payment of compensation by the Crown upon taking possession of land occurred in times of peace, there were some instances in times of emergency and national stress. It is true also that in most instances the absolute interest in the property was acquired, but there were cases in which temporary possession only was taken. The real strength of the appellants' case upon the extracts lies in the absence of any which support the contention of the Crown. There is no recorded instance of the Crown having taken property without payment. According to the authorities on international law, even when the forces of the Crown are invading a foreign country, it is the rule that all property of enemy subjects requisitioned must be paid for. It would be curious if subjects of the Crown were to be treated worse than enemies. The present case is not covered by the decision of this Court in *In re A Petition of Right.* (1)

[*China Mutual Steam Navigation Co.* v. *MacLay* (2) was also referred to.]

Sir Gordon Hewart A.-G., Sir E. Pollock S.-G., Austen-Cartmell, Lowenthal and *Branson* for the Crown. The claim of the Crown is only to exercise its prerogative for the purpose of securing the public safety, and to occupy land for such period as is necessary during times of emergency, and to do that without the obligation of payment. There is nothing in the documents now before the Court to show that the Crown has lost its prerogative. What might have been done in the time of the Tudors under the prerogative is now provided for by statute. Certain prerogative powers formerly exercised in times of war have been extended by statute to conditions of peace: Anson on the Law and Custom of the Constitution, vol. ii., c. 8, s. 2; Hallam's Constitutional

(1) [1915] 3 K. B. 649. (2) [1918] 1 K. B. 33.

C. A. 1919 — De Keyser's Royal Hotel, Ld., *In re.* — De Keyser's Royal Hotel, Ld. *v.* The King.

History (ed. 1876), vol. i., p. 304, and vol. ii., pp. 99, 213. No doubt where a matter within the prerogative is provided for by statute the prerogative is merged in the statute. But unless the ground is completely covered by a statute which purports to take away the prerogative right of the Crown, to the extent to which it is not so covered, the prerogative remains. No case has been produced where proceedings have been taken by a subject for compensation against the Crown or for trespass against its executive officer.

[Swinfen Eady M.R. If the Crown has always paid it would not be expected that any such case would be found.]

It is conceded that before 1803 (43 Geo. 3, c. 55) there was no statutory provision for compensation for the temporary occupation of land by the Crown. The Act of 38 Geo. 3, c. 27, s. 10, was relied upon by the appellants. The power there given was ancillary to, but did not take away the prerogative right of the Crown. That Act definitely indicates that in certain circumstances (e.g., invasion) there was some other method of law which might be invoked. If the statute does not cover the ground the prerogative may still be invoked.

[Swinfen Eady M.R. It is said against you that the Defence of the Realm Acts do cover the ground.]

We submit not.

[Counsel then referred at length to the extracts from the Records.] The instances relied upon by the appellants of compensation paid by the Crown are for the most part indeterminate, and may very well have been cases of ex gratia payments. No case has been produced in which proceedings by petition of right have been taken against the Crown or any executive officer. The Crown has never refused to pay compensation in a proper case though not under any obligation to do so. The right and duty of the Crown to enter upon land for the purposes of public defence are of immemorial antiquity. Temporary occupation of land by the Crown for purposes of public defence is not a disseisin within the prohibition of Magna Charta.

[Swinfen Eady M.R. Does the "prerogative" mean

more than the power which the executive exercises without Parliamentary authority ?]

It imports the duty of the Crown to protect the realm: *Attorney-General* v. *Tomline.* (1)

Although the Crown does not refuse to pay compensation the amount is to be determined by the Losses Commission.

Leslie Scott K.C. in reply.

Cur. adv. vult.

1919. April 9. SWINFEN EADY M.R. The suppliants are De Keyser's Royal Hotel, Ld., and they appeal from the judgment of Mr. Justice Peterson dismissing their petition of right.

The case raises a question of great public importance—namely, whether the Crown is entitled as of right to use and occupy any lands, buildings, and premises of subjects required for administrative purposes in connection with the defence of the realm for an indefinite period, without any obligation to make any compensation for such use and occupation.

The suppliants insist that although it may have been necessary for the organization and administration of a force required for the safety and security of the realm that the Government should occupy their premises, there is not, and never was, any necessity for the safety of the realm to refuse to pay for the same, and the suppliants further insist that the Government are bound by statute to pay.

[The Master of the Rolls then stated the facts, and continued :] Upon the facts, the conclusion must be arrived at that the hotel and premises were occupied and taken and possession thereof given by the consent of the owners, although they reserved all their rights to rent or compensation. The attitude taken by Mr. Whinney on behalf of the owners was quite a proper one. He facilitated by all means in his power the occupation of the premises by the Government, and was active in taking steps for the departure of all the guests, but he reserved all his legal rights.

The claim of the suppliants is for rent or compensation for

(1) (1880) 14 Ch. D. 58.

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

use and occupation during the period of occupation by the Government. The ground rent payable by the company for the premises, under their leases, we were told amounted to 2757*l.* 8*s.* 7*d.* a year.

The Attorney-General by his answer claims that possession of the said premises was lawfully taken by or under the authority of the competent military authority for the use of His Majesty, by virtue of His Majesty's royal prerogative, as well as by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the regulations issued thereunder by His Majesty in Council. He further states that His Majesty claims as against the suppliants no right or interest in the premises beyond the right to take and use them for so long as may be necessary for securing the public safety and the defence of the realm during the continuance of a state of war between His Majesty and any foreign Power. He denies that any rent or compensation is by law payable to the suppliants either under the Defence Act, 1842, or at all.

It is therefore necessary to consider what powers are by law vested in the Sovereign, and exercised by the executive Government, over the lands and houses of subjects required for the defence and security of the realm.

Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers, previously within the prerogative, being exercised in a particular manner and subject to the limitations and provisions contained in the statute, they can only be so exercised. Otherwise, what use would there be in imposing limitations, if the Crown could at its pleasure disregard them and fall back on prerogative? Indeed it was expressly admitted by the Solicitor-General (Sir Ernest Pollock), and in my opinion rightly admitted, that where a matter within the prerogative is provided for by statute, the prerogative is merged in the statute. In *Ex parte Postmaster-General* (1)

(1) (1879) 10 Ch. D. 595.

Sir George Jessel, Master of the Rolls, said: "The general rule, as expressed in Bacon's Abridgment (7th ed., at p. 462), is 'that where an Act of Parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein.'" As instances of the exercise of the Royal prerogative in the past, which are dealt with in the law books, the Crown relied particularly upon the right of entering upon the land of a subject to dig trenches and make fortifications, and to the right to take saltpetre for the purpose of making gunpowder. Various passages from writers of authority were cited dealing with these matters. Thus in Chitty on the Prerogatives of the Crown (chap. IV., s. 5, p. 44): "As the constitution of the country has vested in the King the right to make war or peace, it has necessarily and incidentally assigned to him on the same principles the management of the war; together with various prerogatives which may enable His Majesty to carry it on with effect. Thus . . . . the King is solely entitled to erect, fortify, and govern forts and other places of strength, within his dominions." (1) And at p. 49, "In case of necessity the King may enter on the lands of his subjects to make fortifications." (2) In the *Saltpetre Case* (3) it was resolved: "When enemies come against the realm to the sea coast, it is lawful to come upon my land adjoining to the same coast, to make trenches or bulwarks for the defence of the realm, for every subject hath benefit by it. And therefore by the common law, every man may come upon my land, for the defence of the realm, as appears by 8 Edward IV., chapter 23. And in such case on such extremity they may dig for gravel, for the making of bulwarks; for this is for the public, and everyone hath benefit by it; but after the danger is over, the trenches and bulwarks ought to be removed, so that the owner shall not have prejudice in his inheritance; and for the commonwealth, a man shall suffer damage; as, for saving of a city or town, a house

(1) 2 Inst. 30. 1 Ibid. 5. (2) (1616) 1 Rolle, 152.
(3) 12 Rep. 12.

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

shall be plucked down if the next be on fire; and the suburbs of a city in time of war for the common safety shall be plucked down; and a thing for the commonwealth every man may do without being liable to an action, as it is said in 3 Henry VIII., fol. 15." Although it thus appears by the *Saltpetre Case* (1) that at common law even the public were entitled to enter upon another man's land to dig for gravel to make bulwarks, a statute to the same effect was passed in 1512: 4 Hen. 8, c. 1. This provided that it should be lawful for all the King's subjects, by the advice and assignment of the justices of the peace or sheriff, to make all manner of bulwarks in every man's ground, and to dig and delve for earth and stones for the making of the bulwarks and without any manner of payment, or any manner of action by anyone, against any of the King's subjects for any such matter or cause. The Act was a temporary one to endure to the next Parliament.

The power to enter to make trenches and erect bulwarks obviously has reference to preventing or repelling invasion, when enemies come against the country and when active measures are necessary at or along the coast, and particularly at or near the places threatened.

With regard to saltpetre, this was a matter of "purveyance," and was paid for. The first warrant for searching for it, in evidence in these proceedings, is 7 Hen. 7 (1492); it assigned to James Hede to take material "suitable and requisite for the making of saltpetre for our ordnance, wheresoever they can be found, as well within liberties as without, the fee of the Church only excepted, for our moneys in this behalf reasonably to be paid." Another warrant, in the 6 Hen. 8 (1515), granted to Hans Wolf for the like purpose (Extracts, p. 406), provides for all damage being agreed and paid for. Another warrant, 31 Eliz. (1589) (Extracts, p. 407), requires the petre or powder-makers to make good all damage, making up all places, "Digged or overthrown in as good perfection and state as they or any of them did find the same." A similar warrant, of much

(1) 12 Rep. 12.

greater length (Extracts, p. 409), was issued under the Privy Seal, in 41 Eliz. (1599). This requires the grantees, at their own proper costs and charges, to make up and repair every place "hindered or defaced" by their operations; and concludes, by a clause which should satisfy those who contend for the greatest prerogative—"notwithstanding any statute, Act of Parliament, Order, Proclamation, Ordinance, law, usage, custom, or any other matter whatsoever to the contrary." In the Book of Extracts there follows a warrant by King James I., and the last of the series was granted by King Charles I. on April 28, 1629. (Extracts, p. 431.) This recites that: "At this present time, we have more than ordinary occasion to provide good and sufficient saltpetre and powder to furnish our stores for the defence and safety of our realms and dominions." It then grants powers to take all material fit for making saltpetre and to make the saltpetre into gunpowder, and for that purpose "to have and take workhouses for our said service and houses and stables, outhouses and yards, of any of our subjects and therein to set up vessels and to bestow their servants' cattle and other necessary provisions for the effecting the same our service, paying unto the owners or present possessors of such houses, barns, stables, yards, and outhouses, reasonable rents and rates for the same for the time they shall be used for our service." It will be noticed that this grant was not a private monopoly. It was made after the abolition of monopolies by the statute 21 James 1, c. 3. It was for the obtaining material for the defence of the realm, and the occupation of all lands and buildings was to be paid for. We were told that after the year 1665, or thereabouts, there are not any documents of record referring to saltpetre, as the substance was then obtained in increased quantities from India. In any case, the right to take saltpetre was described as a "purveyance," and purveyances were abolished in 1660 by the statute 12 Chas. 2, c. 4.

Since the reign of James I., when the *Saltpetre Case* (1) was resolved by all the judges of England, the methods

(1) 12 Rep. 12.

C. A. 1919 — De Keyser's Royal Hotel, Ld., *In re.* — De Keyser's Royal Hotel, Ld. *v.* The King. — Swinfen Eady M.R.

of scientific warfare have vastly increased. For the safety and security of the kingdom permanent forts and works have to be constructed, great naval, military and aerial organizations have to be maintained, requiring many depots, and a very large staff of officials to provide for manufacture and supply of every kind, pay and control. It was found necessary to resort to Parliament to obtain powers to enable the executive Government to carry out effectively the proper protective measures, and from an early date the permanent acquisition of land, or the temporary occupation and use of it for such a period as the exigence of the public service shall require, has been regulated and provided for by statute. At first separate statutes were passed for the acquisition of particular properties for forts, batteries, naval harbours and the like. Then, in times of national danger, during the Napoleonic wars, statutes were passed regulating the taking possession of and user of land, but the operation of such statutes was limited in duration to the period of the French War. The next step was to consolidate the provisions into a permanent Defence of the Realm Act, allowing land to be permanently acquired or temporarily occupied, subject to certain restrictions, where the owners did not agree to the Crown's proposal. Then when a state of war again arose, statutes were passed enabling regulations to be made for relieving against these restrictions. This is a general outline of the course of legislation, but it will be necessary to refer to these statutes in detail.

It was urged on behalf of the Crown during the argument, that where in the past lands had been taken over, occupied or used in connection with the defence of the realm, and military occupations connected therewith, there was not any legal obligation on the part of the Crown to pay anything, but that commissions had been issued from time to time to determine what payments should be made by the Crown ex gratia, and that on a search being made particulars of these commissions could doubtless be obtained, and the case stood over from time to time to enable the records to be searched and information obtained with regard to (*a*) Acts

of interference by the Crown with private property in land for the purpose of the defence of the realm. (*b*) Claims by subjects for compensation in respect of such interference (1.) as a matter of right, (2.) as a matter of grace and as to the basis of such claims. (*c*) The manner in which such claims were dealt with and the results thereof. The result of the searches which have been made is that it does not appear that the Crown has ever taken the subject's land for the defence of the country without paying for it; and even in Stuart times I cannot trace any claim by the Crown to such a prerogative. A considerable search in the records has been made, and the results appear in the book of extracts from our Public Records. The time covered by the search may be divided into three periods. First, before 1708; secondly, between 1708 and 1798; thirdly, subsequent to 1798. In the first period instances are given of land being required for fortifications, for mounting guns and otherwise for the defence of the country; but the land taken or occupied was paid for. Thus in 1668 it was determined to construct two new batteries at Chatham "for the better security and safety of His Majesty's Navy in that harbour," and instructions on the subject were given by the Board of Ordnance. These contain a direction (p. 21 of Extracts). "You are to contract for and buy such and so much parcel of ground at each of the aforesaid places of the owners and proprietors thereof as will serve to build the said batteries or redoubts upon, and at the cheapest rates you and they can agree for." Again, in 1681, there was a proposal to erect a new fortification at Hull, and there is a minute of the Board of Ordnance dated September 1, 1681 (p. 9 Extracts), with regard to inquiries as to the measures taken for the new works at Plymouth, and "after what method the owners of those lands were satisfied and paid for the same"; and also "To see what statutes there are concerning taking up of people's lands for building of fortifications thereupon." The Royal authority for executing the work at Hull appears at p. 37 of the Extracts. It contains a provision that "If any ground which is not our own shall be found necessary to be taken in

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

for this service, we do hereby authorise and empower you to cause the same to be contracted for and bought of the owners at the cheapest rates the same may be had."

The second period begins in 1708. It appeared then to be fully recognized that the land of a subject could not be taken against his will, except under the provisions of an Act of Parliament. Accordingly, in 1708, was passed the first of a series of Acts, to enable particular lands to be taken compulsorily. By the statute 7 Anne, c. 26, which recites that it was necessary to enlarge and strengthen the fortifications of Portsmouth, Chatham and Harwich, and to purchase lands for the purpose, and that some proprietors desiring to make an unreasonable gain to themselves might insist on extravagant rates, provision is made for the appointment of Commissioners to survey the lands to be purchased, and in default of agreement with the owners, the true value is to be ascertained by a jury. We were informed by counsel for the Crown that between 1708 and 1798 every case of taking or occupying land was covered by the wide provisions of the Acts passed from time to time, so that there was not any room for the exercise of any alleged prerogative during the period. The third period dates from 1798. On April 5, 1798, was passed the statute 38 Geo. 3, c. 27. This Act recites that it is expedient that provision should be made to enable His Majesty to procure ground which may be wanted for erecting batteries, beacons and other works which may be deemed necessary for the public service and also to provide for the indemnity (in certain cases) of persons who may suffer in their property by measures which may be taken for the defence and security of the country, and annoyance of the enemy. This Act then provides by s. 10 that His Majesty may authorize persons to survey and mark out any ground wanted for the public service and to treat and agree for the possession or use thereof, during such time as the exigence of the service shall require, and in default of agreement, the compensation is to be ascertained by a jury, and with a restriction upon taking without the consent of the owners, unless the enemy shall have actually invaded the kingdom at the time when

the piece of ground shall be so taken. By s. 22 the Act was to have continuance during the war with France.

By statute 43 Geo. 3, c. 55 (passed June 11, 1803), intituled "An Act to enable His Majesty more effectually to provide for the defence and security of the realm during the present war," power was given to His Majesty to survey and mark out ground wanted for the public service and to treat and agree for the possession and use of it, during such time as the exigencies of the service should require, and in default of agreement the compensation to be paid for the possession or use was to be ascertained by a jury. Sect. 22 shows that the Act was confined to "the present hostilities with France." Doubts arose whether this Act extended to authorize the absolute purchase and taking of lands for permanent purposes, and accordingly next year was passed the Act 44 Geo. 3, c. 95 (July 28, 1804), enabling land so required to be purchased absolutely and the price to be ascertained by a jury in default of agreement.

In 1819 a question arose about some land between Sandgate and Hythe which the Master-General of the Ordnance required for the use of the Crown to erect batteries and form a camp there. The owner was willing to grant a lease of the land during the war, but the Master-General declined that proposal and expressed himself as determined for the benefit of the country to purchase the land in question, "and in case Mr. Jeffery persisting in the refusal to sell to bring in a Bill in Parliament to empower the Board of Ordnance to purchase the land in question, and to have the value ascertained by a jury as is usual": Book of Extracts, p. 449. No suggestion of taking by virtue of any prerogative was advanced by the Ordnance.

The Defence Act, 1842, recites various Acts of Geo. 3, Geo. 4 and Will. 4, whereby various provisions have been theretofore made for the purchase of land and hereditaments for the public service, and for the defence and security of the realm, and that it is expedient to consolidate, amend and enlarge such powers and provisions. The Act then provides by ss. 5 and 6 for vesting in the principal officers of Her

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

Majesty's Ordnance lands and hereditaments acquired and thereafter to be acquired for the defence and security of the realm. Sect. 9 confers power on the principal officers of Ordnance to purchase or take on lease lands desirable to be purchased for the defence of the realm and to enter into any necessary contracts. Sect. 16 authorizes the principal officers of Ordnance to enter on, survey and mark out any lands or hereditaments wanted for the defence of the realm, and to treat and agree with the owners of the same "either for the absolute purchase thereof, or for the possession or use thereof during such time as the exigence of the public service shall require." By s. 19, if the parties interested fail to agree within 14 days upon the consideration for the absolute purchase or the annual rent or sum for the hire, either for a time certain or for such period as the exigence of the public service may require, then certain justices of the peace or other persons named in the statute are authorized and required to put the said principal officers into immediate possession of the said lands and hereditaments and to issue their warrants to the sheriff to summon a jury, to value the premises and assess the compensation to be paid for the absolute purchase or for the possession or use thereof as the case may be. Then follows a proviso that it shall not be lawful for the principal officers to use any lands, buildings or hereditaments taken under the compulsory process for the barrack service or to erect any barrack buildings thereon. By s. 23 it is provided that no lands, buildings or hereditaments shall be so taken without the consent of the owners, unless the necessity or expediency of taking the same shall be first certified by the Lord-Lieutenant or certain other persons, or unless the enemy shall have actually invaded the United Kingdom at the time when such lands, buildings or other hereditaments shall be so taken. It will thus be seen that the statute applies as well in time of war as in time of peace; but in time of war, and actual invasion by the enemy, one of the restrictions on using the compulsory powers—namely, the certificate of the Lord-Lieutenant or other named persons—is unnecessary. This restriction, however, remains in war time, if the enemy has not actually invaded

the kingdom; and there is also the restriction of having to allow fourteen days to elapse before the principal officers are entitled to require that they shall be put into immediate possession of the property. The subsequent assessment and payment of compensation is not a restriction. The obligation to pay follows on the acquisition of the interest in the land, but the assessment and payment take place after possession of the property has been given to the principal officers and does not hinder or affect the principal officers in putting the property to such uses as they may think fit.

After the outbreak of the great war two statutes were passed in August, 1914, the Defence of the Realm Act, 1914, and the Defence of the Realm (No. 2) Act, 1914. His Majesty in Council was thereby authorized, during the continuance of the war, to issue regulations for securing the public safety and the defence of the realm, "and may by such regulations also provide for the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making bye-laws, or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903." These statutes thus provide for regulating the existing powers. Orders in Council were made under the powers of these statutes. The Defence of the Realm Regulations, 1914, and the Defence of the Realm (No. 2) Regulations, 1914, were issued, and amended by an Order in Council dated September 17, 1914. These Regulations provide for the suspension of certain restrictions. The fourteen days' delay provided for by s. 18 of the Defence Act, 1842, disappears, as authority is given to take immediate possession of land and buildings where necessary for the public safety or defence of the realm. Again, compulsory acquisition, whether permanent or temporary, is authorized, without the need for any invasion of the United Kingdom as a condition precedent to the exercise of compulsory powers. Thus during the continuance of the great war, and while the Defence of the Realm Regulations remain in force, the powers of acquiring land compulsorily (whether permanently or temporarily) under the Defence Acts are extended, and restrictions on its exercise removed, but no

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

power was or could be conferred by the regulations to take the land of a subject without payment. In order to secure the public safety and the defence of the realm, it may be necessary to obtain immediate possession of land and buildings, but neither the public safety nor the defence of the realm requires that the value of the subject's land, or of the temporary possession of it, should be confiscated. Again, if the Executive Government is authorized under the Defence Acts to take and occupy land on paying compensation, there is no necessity for the safety of the realm to take any other course so long as any restrictions upon acquiring the immediate possession of the land are removed. Moreover there is not any Defence of the Realm Regulation purporting to abolish the right to compensation; even if there had been such a regulation it would not, in my opinion, have been authorized by the powers conferred by the Defence of the Realm Act, 1914, or the (No. 2) Act, 1914. On this point I may refer to what was said by Brett M.R. in the *Attorney-General* v. *Horner* (1), that: "It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation, unless one is obliged to so construe it." And also to the judgment of Bowen L.J. in *London and North Western Ry. Co.* v. *Evans.* (2) "The Legislature cannot fairly be supposed to intend, in the absence of clear words showing such intention, that one man's property shall be confiscated for the benefit of others or of the public, without any compensation being provided for him, in respect of what is taken compulsorily from him. Parliament in its omnipotence can, of course, override or disregard this ordinary principle . . . . if it sees fit to do so, but it is not likely that it will be found disregarding it, without plain expressions of such a purpose." The contention of the suppliants that the entry of the Crown upon the land was in fact under the Defence Act, 1842, and subsequent provisions, and that the liability to pay compensation arises directly under the statute, cannot be met by saying that the King is not bound by legal fiction. The suppliants do not rely on any fiction, and they

(1) 14 Q. B. D. 245, 257. (2) [1893] 1 Ch. 16, 28.

urge that a contract express or implied arises under the statute. In the case of a contract for letting, followed by occupation, without the amount of rent having been fixed, an action for use and occupation would lie. The action is for damages for breach of agreement to pay for the use of the owner's property. Lord Ellenborough said, in *Dean and Chapter of Rochester* v. *Pierce* (1): "The action for use and occupation does not necessarily suppose any demise. It is enough that the defendant used and occupied the premises by the permission of the plaintiff." Where premises have been used or occupied by the permission or sufferance of the owner, and there is not any demise or agreement at a fixed rent, the law will imply a contract or promise to pay to the owner a reasonable sum for such use and occupation. *Marquis Camden* v. *Batterbury* (2); *Levi* v. *Lewis* (3); *Hellier* v. *Sillcox* (4), explained in *Churchward* v. *Ford.* (5) This obligation to pay is a contractual one. The fact that the claim of the suppliants is for an unascertained amount of compensation or even a claim for damages for breach of contract, would not be any objection to a proceeding by petition of right. *Reg.* v. *Doutre* (6) was a claim by petition of right for damages for breach of contract to pay the suppliant a reasonable sum for professional remuneration, and it succeeded, although the point was taken by the Attorney-General of Canada in his defence that the suppliant was not entitled to proceed by petition of right. Again in *Windsor and Annapolis Ry. Co.* v. *The Queen* (7), Lord Watson in delivering the opinion of the Board said: "Their Lordships are of opinion that it must now be regarded as settled law that, whenever a valid contract has been made between the Crown and a subject, a petition of right will lie for damages resulting from a breach of that contract by the Crown. Sect. 8 of the Canadian Petition of Right Act (39 Vict. c. 27, Dom. Parlt.) contemplates that damages may be recoverable from

(1) (1808) 1 Camp. 466, 467.
(2) (1859) 5 C. B. (N. S.) 808; (1860) 7 C. B. (N. S.) 864.
(3) (1859) 6 C. B. (N. S.) 766; (1861) 9 C. B. (N. S.) 872.
(4) (1850) 19 L. J. (Q. B.) 295.
(5) (1857) 2 H. & N. 446, 449, 450.
(6) (1884) 9 App. Cas. 745.
(7) (1886) 11 App. Cas. 607, 613.

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Swinfen Eady M.R.

the Crown by means of such a petition; and the reasons assigned by Lord Blackburn for the decision of the Court of Queen's Bench in *Thomas* v. *The Queen* (1) appear to their Lordships necessarily to lead to the conclusion that damages arising from breach of contract are so recoverable. A suit for damages, in respect of the violation of contract, is as much an action upon the contract as a suit for performance; it is the only available means of enforcing the contract in cases where, through the act or omission of one of the contracting parties, specific performance has become impossible. In *Tobin* v. *The Queen* (2) Chief Justice Erle, whilst affirming the doctrine that the Sovereign cannot be sued in a petition of right, for a wrong done by the executive, took care to explain that 'claims founded on contracts and grants made on behalf of the Crown are within a class legally distinct from wrongs.' It was argued for the respondent that in *Thomas* v. *The Queen* (1) the claim of the suppliant was not for damages, but for a pecuniary consideration alleged to have been due in terms of the contract; and consequently that it was unnecessary for the Court to decide anything as to the liability of the Crown for unliquidated damages resulting from breach of contract. But Lord Blackburn, in that case, deals with the suppliant's petition as alleging certain breaches of promises made to the suppliant on behalf of the Queen; and his reasoning appears to this Board to be quite as applicable to a claim of unliquidated damages for breach of contract, as to a claim for the contract price. Lord Blackburn rests the judgment mainly upon the *Bankers' Case* (3), which was a suit for annuities granted by letters patent under the great seal; but his Lordship at the same time points out that, from the time of Lord Somers, there had been repeated expressions of opinion by eminent judges in favour of the view that a petition of right lay against the Crown on a contract. It is unnecessary to cite these opinions, which are all collected in *Thomas* v. *The Queen*." (1) There are also given in Mr. Clode's book on Petitions of Right, p. 135, particulars of

(1) (1874) L. R. 10 Q. B. 31. 355.
(2) (1864) 16 C. B. (N. S.) 310, (3) 14 How. St. Tr. 1.

unreported cases in the Court of Appeal, where this Court has accepted as law the judgment in *Thomas* v. *The Queen*. (1)

Peterson J. decided against the suppliants, as he considered that the present case was governed by *In re A Petition of Right*. (2) In that case the Crown took possession of an aerodrome near Brighton. It was justified in argument, upon the same ground as entering upon land adjoining the sea coast to dig trenches. The aerodrome was actually required for the conduct of hostilities in the air. The case was taken on appeal to the House of Lords and there compromised. But whether rightly decided or not—and it is of course still open to review in the House of Lords—it has no application to such a case as the present—namely, taking possession of lands and buildings for administrative purposes. If the argument for the Crown in the present case be well founded, any lands and buildings required for offices or administrative purposes for any branch of the fighting services, as War Office, Admiralty and Air Force, may be taken by the Crown from the subject at the pleasure of the Executive without express statutory authority and without payment.

I am of opinion that the judgment appealed from should be reversed, and that judgment should be entered in favour of the suppliants that they are entitled to the relief sought by para. 4 of the claim made by their petition.

The judgment will be in accordance with the provisions of s. 9 of the Petitions of Right Act, 1860, the suppliants to have the costs in the Court below and of this appeal, and any costs paid under the judgment below to be repaid to the suppliants.

WARRINGTON L.J. In the month of May, 1916, the officers of the Crown, being of opinion that for the purpose of securing the public safety and the defence of the realm it was necessary so to do, took possession of a large hotel near Blackfriars Bridge called De Keyser's Hotel, and have remained in occupation since that time. The question raised by this petition of right is whether the suppliants, the lessees of the hotel,

(1) L. R. 10 Q. B. 31. (2) [1915] 3 K. B. 649.

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER' ROYAL HOTEL, LD. *v.* THE KING.
Warrington L.J.

are legally entitled to be paid any and what sum for the use of the hotel. The Crown insists that they are entitled as of right to nothing, but is willing that they should be paid ex gratia such sum for direct loss or damage to property or business as the Commission, usually known as the Losses Commission, may determine. It will be observed that this offer on the part of the Crown is confined to direct loss or damage to business or property, and does not extend to the making of any payment for the occupation of the premises analogous to the payment of rent or compensation for the use and occupation.

The hotel was originally taken for the accommodation of the headquarters staff of the Royal Flying Corps, and was for some time occupied by them ; it was afterwards occupied by the staff of certain departments of the War Office.

The petition was heard by Peterson J. on March 22, 1918. He held that the case was covered by the judgment of this Court in *In re A Petition of Right* (1), and dismissed the petition. It is not disputed by the suppliants that under the Defence Act, 1842, or under the powers conferred by the Defence of the Realm Consolidation Act, 1914, and the regulations made thereunder, or under both of these legislative provisions combined, the Crown was entitled to take possession of the hotel, but they contend that by whatever authority possession was taken they are entitled as a matter of legal right to compensation in the ordinary sense—that is to say, to a payment in the nature of rent or purchase money for the occupation by the Crown of their property. The Crown, on the other hand, insists that possession was taken either by virtue of the Royal prerogative or of the powers conferred by the Defence of the Realm Acts and Regulations, and that in the case of possession being so taken no compensation of any kind is by law payable to the subject. It contends further that possession was not taken under the Defence Act, 1842, and that even if it were the right to compensation thereby given was suspended by the recent Defence of the Realm Acts and Regulations, and cannot be enforced by the suppliants.

(1) [1915] 3 K. B. 649.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Warrington L.J.

The building in question is a large hotel of a modern type with from 300 to 400 rooms. The outbreak of war had deprived it of much of its custom, and at the time in question it was in the possession of Mr. A. F. Whinney as receiver and manager appointed in a debenture holders' action, and was being carried on at a loss. The Government required accommodation for the headquarters staff of the Royal Flying Corps, and early in April, 1916, entered into negotiation with Mr. Whinney with the view to their occupation of the premises at a rent. The parties did not come to terms, although negotiations were not finally broken off when on May 1, 1916, Mr. Whinney was informed that possession would be taken under the Defence of the Realm Acts. Mr. Whinney, without prejudice to his rights, offered no opposition, and on May 8 he delivered possession to the officer of the Crown, having previously taken steps to procure the evacuation of the hotel by the guests then staying there. This was, as he says, "under protest," but on looking at his evidence I think what he protested against was the resort to the Acts while the correspondence as to rent was still pending, and indeed from subsequent correspondence it is clear that he considered this question as still open. See particularly Mr. Whinney's letter of May 5. On the facts I should come to the conclusion that so far as possession was concerned he gave this without compulsion on the footing that the question of compensation might be the subject of negotiation. It was not till afterwards that Mr. Whinney understood that the Crown finally denied his right to compensation.

The present case differs in its facts from those in *In re A Petition of Right* (1), first, in that the subject-matter of that case—an aerodrome or aviation ground on the coast—was of itself of military importance; and, secondly, that in that case possession seems to have been taken altogether in invitum. Moreover there is a great mass of material before the Court which was not before it in the previous case, and considerations and arguments have been submitted to us which were not submitted to the Court then, and I propose

(1) [1915] 3 K. B. 649.

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Warrington L.J.

to consider the question for the moment as if the Court were unfettered by the previous decision, to the consideration of which I will return later. I propose to confine the present judgment strictly to the consideration of the question we have to determine, namely, whether where the Crown, i.e., the executive authority, acting in the interests of the community at large and on the ground that what it has done is necessary for the national security and the defence of the realm, has taken possession of and has occupied land of a subject, that subject has a legal claim to compensation for what has been so taken and used. It is really not disputed by the suppliants that in the circumstances I have mentioned the Crown has power by its officers to take possession of and use or occupy the subject's land, the sole question is as to the legal right to compensation. The first contention on the part of the Crown is that the power in question is part of the Royal prerogative. We have had an interesting historical and constitutional discussion on this subject, and we have had submitted to us many ancient records pertinent thereto. These last have at least this negative value, that there is no trace in any of them of an assertion on the part of the Crown of a right to take and hold possession of the subject's land without paying for it. It is unnecessary however in this case to decide whether an exercise of the prerogative would give rise to any, and what, rights in the subject, inasmuch as counsel for the Crown admitted (and in my opinion rightly) that where an act of the Crown is authorized by statute any pre-existing prerogative right to do the same act is merged in the statutory authority, and the act in question must be deemed to have been done by virtue of the latter. In my opinion it is clear that under the Defence Act, 1842, possession of the land might have been obtained subject to the restrictions in that Act contained; and further, that those restrictions were suspended by the regulations made under the Defence of the Realm Acts, so far at all events as to enable the competent naval or military authority to take possession without going through any of the preliminary steps or satisfying any of the conditions prescribed by the Defence Act, 1842. The act therefore

was done under statutory authority, and prerogative is out of the question. Does the exercise of this statutory authority involve a legal liability on the part of the Crown to pay compensation ?

Before the year 1798 a number of Acts of Parliament were passed, the earliest of which was of the year 1708, authorizing the officers of the Crown to acquire compulsorily on its behalf land in various parts of the country on or near the coast for the purpose of fortification in view of a possible invasion or attack. In each case provision was made for the payment of compensation, to be assessed in default of agreement by a jury. The operation of these Acts was confined to certain localities and to the permanent acquisition of land, but in the year 1798 an Act of a more general nature was passed. It provided means by which certain officers of the Crown might, by taking the steps thereby prescribed, obtain either by agreement with the owners or compulsorily the possession of any ground wanted for the public service during such time as the exigence of the service should require, and it provided for the assessment by a jury and payment of compensation for the possession or use of such ground. Certain conditions had however to be fulfilled before the compulsory power could be put in force. Similar Acts were passed in 1803 and in 1804, in each case provision being made for the assessment and payment of compensation. The Act of 1804 expressly removed any possible doubts which may have existed under the previous Acts as to the power of the Crown to acquire land for permanent purposes. All these Acts were passed in time of war or national emergency, and with the object of more effectually securing the defence of the realm. The point that is material for the present purpose is that even under such circumstances provision is in every case made for payment of compensation whether the land is taken permanently or temporarily. The Acts hitherto mentioned have all either expired by effluxion of time or have been repealed. They have, however, been replaced by the Defence Act, 1842, passed in time of peace. This Act in ss. 16 and 19

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Warrington L.J.

contained provisions corresponding in all material respects with those contained in the previous Acts I have referred to as to the compulsory taking of lands either permanently or temporarily, and required substantially the same preliminary steps before possession could actually be obtained, and in s. 23 certain conditions were imposed, the fulfilment of which was made essential to the compulsory taking of land. In this as in the previous Acts provision was made for the ascertainment by a jury of compensation described in the case of temporary occupation as "the compensation to be paid for the possession or use of the premises." Sect. 34 authorizes the officers of the Ordnance to take proceedings in their statutory name in regard to lands vested in them, with a saving of the legal rights, privileges and prerogatives of the Crown in reference to such proceedings, but the Act contains no further express reference to or saving of the Royal prerogative. So matters stood until the outbreak of the war, and the passing of the Defence of the Realm Acts of 1914. There was, as it seems to me, an obvious inconvenience and danger, having regard to modern conditions of warfare, and in particular to the suddenness with which an attack upon our shores can now be made, in the restrictions and conditions by the Defence Act, 1842, imposed upon the compulsory taking possession of land, and there was every reason why these restrictions and conditions should be removed so that possession might at once be taken without the necessity of observing any preliminary formalities or fulfilling the conditions previously imposed on the exercise of compulsion. These considerations however have no application to the provisions as to the ascertainment and payment of compensation; provided possession can be had at once the question of compensation can be settled at leisure without danger to the public safety. Under these circumstances the Defence of the Realm Consolidation Act, 1914, was passed on November 27, 1914. It repealed two previous Acts passed for the same purpose in August, 1914, with a provision (s. 2 (2.)) that nothing in that repeal should affect any Orders in Council made under those Acts, and all such

Orders in Council should, until altered or revoked by an Order in Council under the Consolidation Act, continue in force and have effect as if made under that Act. The Act declared (s. 1 (1.)) that His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm, and as to the powers and duties for that purpose of the Admiralty and the Army Council and of the members of His Majesty's forces and other persons acting on his behalf. It was enacted by sub-s. 2 that any such regulations might provide for the suspension of any restrictions on the acquisition or user of land under (amongst other statutes) the Defence Act, 1842. There is no reference in the Act I am now dealing with to the taking possession of land, and as a matter of construction I should come to the conclusion that the object was not to confer power to do this, but to recognize and rely on the power existing under the Defence Act, 1842, and at the same time enabling the Crown to make the process of putting it in force easier and more speedy.

On November 28, 1914, certain regulations under the Act were made by Order in Council. Regulation No. 2, so far as it is material, is as follows: "It shall be lawful for the competent naval or military authority and any person duly authorised by him, where for the purpose of securing the public safety or the defence of the realm it is necessary so to do (*b*) to take possession of any buildings; (*f*) to do any other act involving interference with private rights of property which is necessary for the purpose aforesaid." The regulations contain no express provision for the suspension of any restrictions in the acquisition or user of land under the Defence Act, 1842, nor any provision for compensation for acts done under the powers conferred by Regulation 2. There are references to compensation in regard to other matters, particularly in Regulation 2 B, relating to the taking possession of war material, food and certain other articles, and the same regulation mentions "the tribunal by which claims for compensation under these regulations are, in the absence of any express provision to the contrary, determined." I

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Warrington L.J.

have however failed to discover in the regulations any provision constituting or identifying this tribunal. Unless however the provisions as to the ascertainment of compensation contained in the Defence Act, 1842, are suspended there would, in relation to land, be express provisions to the contrary, and this compensation would fall to be determined as provided for by the last-mentioned Act, and it would be unnecessary to inquire further as to what is meant by the tribunal referred to in Regulation 2 B. The competent naval or military authority is defined by Regulation 62, and may be any commissioned officer not below the rank of lieutenant-commander in the Navy or field officer in the Army.

The true result of this legislation appears to me to be that the Defence Act, 1842, the Act of 1914, and the regulations must be read together, and that the power to acquire possession is still derived from the Defence Act, 1842, but its exercise is regulated by the Act of 1914 and the regulations. If this be so, then unless the Act of 1914 and the regulations suspend the provision for compensation contained in the Defence Act, 1842, that provision would remain in force and be applicable in the present case.

I must now return to the consideration of *In re A Petition of Right.* (1) The matters actually decided in that case were first, that the Crown has power under the prerogative to take possession of, and to hold and use without paying compensation, such premises as were in that case in question, namely, an aerodrome on the coast, of actual military importance in providing for the defence of the realm; and secondly, that the Defence Act of 1842, and the Defence of the Realm (Consolidation) Act, 1914, and the regulations are separate and independent legislative enactments, the first of which is not applicable in a national emergency such as in fact existed and for which the second alone provided.

As to the first point the present case is in my opinion distinguishable, first, by reason of the essentially different nature of the premises of which possession is taken; and, secondly, by reason of the admission of the Crown that where,

(1) [1915] 3 K. B. 649.

as is in my opinion the case here, complete and sufficient statutory powers are conferred, the power conferred by the prerogative is merged therein.

As to the second, a new point not raised in *In re A Petition of Right* (1) was taken before us, namely, that the two enactments are not separate legislative enactments, but that they must be read together, the power of obtaining possession being derived from the earlier of the two, the officers authorized to act being appointed by, and the inconvenient and dangerous restrictions being suspended by the later. This view, which I am satisfied is the correct one, disposes of the difficulties which led the Court to hold that the Defence Act, 1842, was not applicable to the existing circumstances, and not having been then presented to or considered by the Court may in my opinion be acted upon in this case notwithstanding the previous decision.

There remains the question as to whether the provision for compensation as well as the provisions affecting the power to take possession contained in the Defence Act, 1842, are suspended by the recent statute. On this point all three members of the Court (Pickford L.J. with considerable hesitation) expressed the view that they were so suspended. Having regard, however, to the view expressed as to the non-applicability of the Defence Act, 1842, this point was not necessary to the decision, and the view so expressed was therefore obiter. I do not hesitate to say that though I expressed that view I am now satisfied, after the further argument we have heard, and on the further materials we now possess, showing the course of legislation and practice in time of national danger, that it was not correct. The question is one of construction, and the circumstances under which the Act was passed must be taken into account. These circumstances amply justify the view that Parliament intended to make the taking possession of land as easy and rapid as possible, but I fail to see how they lead to the conclusion that it intended also to deprive the subject of the right to compensation which had always been recognized even in times

(1) [1915] 3 K. B. 649.

C. A. 1919 — De Keyser's Royal Hotel, Ld., *In re.* — De Keyser's Royal Hotel, Ld. *v.* The King. — Warrington L.J.

of grave national danger. The regulations do not in terms suspend any restrictions; their provisions however are inconsistent with the observance of the formalities and conditions provided by the Defence Act, 1842, and these must in my judgment be held to be impliedly suspended. There is, however, no such necessity in the case of the provision for compensation, and this in my opinion remains unaffected.

The result is in my opinion that possession of the suppliants' hotel was taken and held by the Crown under statutory authority, the exercise of which gave the suppliants a legal right to compensation to be assessed and paid as provided for by the Defence Act, 1842. This right is in the nature of a contractual right, and can, in my opinion, be enforced by means of a petition of right. The compensation is in the Act described, in the case of temporary use, as "the compensation to be paid for the possession or use of" the premises, and I think this introduces the same measure as that resorted to in actions for use and occupation, that is to say, what the occupation is worth, and I do not think the suppliants are entitled in addition to compensation for loss arising from their being prevented from carrying on their business.

I think, therefore, the suppliants are entitled to a declaration such as is claimed in para. 4 only of the prayer of the petition. They are not in a position to obtain any further order, but the officers of the Crown would, no doubt, act on the declaration if made.

Duke L.J. The suppliants upon this petition of right are owners of a valuable block of premises in the City of London called De Keyser's Royal Hotel, who have been dispossessed of their property since May, 1916, under an Order made by the Army Council directing that possession of the same should be taken for purposes of public defence. They claim from the Crown compensation for the use and occupation of the hotel upon the basis of an alleged rental value of 17,500*l.* per annum. On the part of the Crown a right is alleged to enter upon and occupy the premises without

any legal obligation to pay compensation, but at the time of the entry an offer was made to pay out of public funds such a sum as should be determined by the Royal Commission on Defence of the Realm Losses to be the amount of the loss or damage actually caused to the suppliants by reason of the occupation. Important questions of principle underlie the dispute, as to the basis on which the suppliants ought to receive compensation out of public funds, which actually led to the litigation.

The suppliants allege in their petition a voluntary delivery of the premises in question by them to the representatives of the Crown upon an agreement for payment by the Crown of a fair rent or other compensation. Apart from the alleged agreement they claim further that they are entitled to be paid rent or compensation by virtue of the Defence Act, 1842. The alleged agreement is traversed on behalf of the Crown. The Crown alleges necessity by reason of the existence of a state of war for the occupation of the premises for the purpose of securing the public safety and the defence of the realm, and says that the possession complained of was properly and lawfully taken by virtue of His Majesty's Royal prerogative as well as by virtue of the powers conferred by the Defence of the Realm Consolidation Act, 1914, and of the regulations made thereunder by His Majesty in Council. He says also that no rent or compensation is by law payable to the suppliants under the Defence Act, 1842, or at all. Peterson J. gave judgment for the Crown upon all the questions raised by the pleadings.

The questions of difficulty in this appeal arise upon the issues other than those joined upon the alleged right of the suppliants to payment under an agreement. The prerogative powers which are claimed could only come in question in the event of the security of the kingdom being threatened by a foreign enemy. The alleged rights of the Crown, if they exist, have their origin before the time of legal memory and are incongruous with modern practice. The process by which the suppliants seek to enforce their alleged rights is for remedial purposes of very limited scope, the jurisdiction of the Court

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Duke L.J.

being no greater for any practical purpose than it was in the seventeenth century.

For the determination of the appeal four things have to be ascertained—namely, the true state of the facts as to the alleged agreement; the rights of the Crown, if any, apart from agreement in respect of the property; the rights of the subject apart from agreement in respect of the alleged acts of the public authorities; and the jurisdiction of His Majesty's Courts to pronounce a judgment upon the suppliants' several matters of complaint.

Before May, 1916, negotiations had taken place between the Lands Branch of the War Office and Mr. Whinney, receiver and manager of the suppliants' business, with a view to the conclusion of an agreement between the suppliants and the Crown for the occupation of De Keyser's Hotel for purposes which the Government deemed to be essential for national defence, and upon terms of payment of an agreed rental. Mr. Whinney was prepared to let the premises for a net sum of 19,000*l.* per annum subject to various onerous conditions, and after some inconclusive communications the advisers of the Crown determined that the premises should be acquired not by agreement but by requisition under the Defence of the Realm Regulations; and on May 1, 1916, Mr. Cole, an officer of the Lands Branch, notified Mr. Whinney that he was instructed by the Army Council to take possession of the property under these regulations, adding this: "I enclose forms of claims for submission to the Defence of the Realm Losses Commission. Compensation, as you are probably aware, is made ex gratia, and is strictly limited to the actual monetary loss sustained." Mr. Whinney, by letters addressed to various representatives of the Crown, protested against the decision which had been taken. In particular he wrote on May 5: "It does not seem to me that the acquisition of this building as offices is necessary for the purpose of securing the public safety or the defence of the realm, or that such an acquisition is within the powers conferred by the Defence of the Realm (Consolidation) Regulations, 1914. I must therefore enter a protest against

the notice contained in the letter being acted upon, and you must understand that anything which I do is without prejudice to the rights of all parties interested in the hotel." Mr. Whinney also applied in the Chancery Division of the High Court for directions of a judge. He had no course open to him other than to deliver up possession of the premises unless he were to take personal proceedings against the representatives of the Crown to restrain them from carrying their declared intention into effect, and he quite properly gave up possession under protest. Representatives of the Crown have been ever since in occupation of the hotel. On November 16, 1916, in a letter complaining that no compensation was being paid to the suppliants by the Crown, Mr. Whinney wrote: "I would point out that it is now over six months since the hotel was commandeered." The nature of the transaction could not have been more plainly expressed. The allegation in the petition that the premises are being occupied by the Government under an agreement between the Crown and the suppliants manifestly could not be sustained. The learned judge who tried the case says upon this subject: "I find it impossible to come to the conclusion that, as is alleged in the petition, possession was voluntarily delivered or that the Crown uses or occupies the hotel by the suppliants' permission. The Crown was acting or purporting to act under what it conceived to be its compulsory powers, and that act on the part of the Crown was protested against by Mr. Whinney." No other conclusion seems to me to be possible. I pause to add that on the principle laid down in *Thomas* v. *The Queen* (1), upon the authority of the *Bankers' Case* (2), an affirmative finding upon the suppliants' allegation of an agreement between them and the Crown would have entitled them to the judgment of the Court, and that my ultimate opinion upon their appeal depends in the first place upon the fact that there was no such agreement.

The right of the Crown to occupy the suppliants' premises for necessary purposes of public defence in time of war was based by the Attorney-General upon the Royal prerogative,

(1) L. R. 10 Q. B. 31. (2) 14 How. St. Tr. 1; 5 Mod. 29; Skinner, 601.

C. A.
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Duke L.J.

and, alternatively, upon the Defence of the Realm Consolidation Act, 1914, and the Defence of the Realm Regulations. The ground of prerogative was the ground most elaborately discussed before us. The argument for the Crown was in effect that at common law there is in the Sovereign the duty of defending the realm, that this duty carries with it all necessary rights for the doing of things incident to the performance of the duty, so far as they are not unlawful, and that one of these incidental things is the occupation of land whenever military necessity so requires. As to legality it was said for the Crown that temporary occupation for defence is not a disseisin within the prohibition of Magna Charta. As to necessity it was contended that the Sovereign is constitutionally the arbiter. The common law duty of the Sovereign to defend the realm appears clearly in the arguments and judgment in *Hampden's Case* (1)—the *Case of Shipmoney*. The right of the Crown to enter upon lands of a subject for purposes of public defence was affirmed by the unanimous opinion of the judges given consultatively to the Crown in the *Case of Saltpetre*. (2) Mr. St. John's argument against the Crown in the *Case of Shipmoney* (1) throws a clear light upon the class of questions here under discussion, and the judges there, although they were divided as to the matter which was immediately to be decided, were unanimous as to certain questions which are material to the present case. I shall refer only to the judgments of two of the judges whose opinions were given adversely to the claim of the Crown. Crooke J. said in discussing the prerogative (3): "The law provideth a remedy, in case of necessity and danger; for then the King may command his subjects, without Parliament, to defend the kingdom. How? By all men of arms whatsoever, for the land; and by all ships whatsoever, for the sea, which he may take from all parts of the kingdom and join them with his own navy; which hath been the practice of all former kings." Hutton J. said(4): "The care for the defence of the kingdom belongeth inseparably to the Crown."

(1) 3 How. St. Tr. 825.
(2) 12 Rep. 12.
(3) 3 How. St. Tr. 1134.
(4) 3 How. St. Tr. 1195.

Mr. St. John for the defendant had said (1): "It must needs be granted that in this business of defence, the suprema potestas, is inherent in His Majesty." "Neither hath the law only entrusted the care of defence to His Majesty, but it hath likewise . . . . put the armatam potestatem and means of defence wholly into his hands. . . . . Neither . . . . is His Majesty armed only with his primitive prerogative of generalissimo and commander in chief . . . . but also with all other powers requisite for the full execution of all things incident to so high a place, as well in times of danger as of actual war." One of the grounds on which Hampden's resistance to shipmoney was based by Mr. St. John was the existence of "the many prerogatives which the law hath settled in the Crown for the defence of the kingdom." A right to summon all subjects to defend the realm by personal service (Foster's Crown Law, 157, 158; Fitzherbert's Nat. Brev., 192; Co. Litt. 75, 76); the power of the Crown to issue commissions of array (Parliament Rolls, 3 Rush. 1229); power of impressment of ships and men for the Navy (Chitty, cap. iv., Selden, Mare Clausum, cap. xx.; Blackstone's Commentaries, i., 406); *Ex parte Fox* (2); and the exclusive authority to erect fortifications (Comyn's Digest, Tit. Prerogative), have been considered clear instances of prerogative rights which existed at common law. The right to enter upon lands within the realm as and when military defence requires it is claimed in this case as such a right; and is said to be exemplified in the decisions of various Courts of law which were cited in *In re A Petition of Right* (3) with regard to the raising of bulwarks to repel invasion. As was pointed out for the suppliants, these were all decisions in litigation between subjects and not express determinations as to the rights of the Sovereign. Litigation upon such a question as between the subject and the Crown could hardly occur. The subject would not be likely to ask or get the Royal fiat for a petition of right, and the Sovereign obstructed in what he deemed the necessary defence of the

(1) 3 How. St. Tr. 860. (2) (1793) 5 T. R. 276.
(3) [1915] 3 K. B. 649.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD. *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Duke L.J.

realm would probably not resort to a prosecution for misdemeanour. The absence of legal records was relied upon by the suppliants as proof of non-existence of the alleged right. It is true that the Year Books, the more modern Reports, the Parliament Rolls, and the public accounts show no trace of a previous occurrence of such a controversy as this. It is equally true that within the time of legal memory armies arrayed under the authority of the Crown have repeatedly occupied large areas of land in all parts of the country to the exclusion for longer or shorter periods of time of the owners of the land. There are no records of complaints by action at law or, so far as I know, by petition to the Crown, or by Parliamentary protest, and the searches made by the parties in the Record Office produced no proofs of payment except for lands purchased or rented under statutory powers or by agreement. On the whole the absence of decided cases and of records of payments or other admissions of liability by the Crown seems to me not to support the suppliants' case in this regard, but rather to tend to destroy it. The cases between subjects in which the plea of necessity in time of war for public defence was successfully raised in early times in actions of trespass are fairly numerous. In 8 Edw. 4 (1) a custom in Kent "when the enemy come to the coast" to enter upon land adjoining the same coast in defence and safeguard of the realm and then to make there trenches and bulwarks for the defence of the realm was held to be well pleaded. In 21 Hen. 7 (2) entry upon land in time of war pur faire bulwark in defence du Roy et le Realm was held to be "justifiable as a thing necessary for the commonwealth though otherwise illegal." In 14 Hen. 8 (3) the opinion of the Court of Common Pleas is recorded to the effect that "suburbs d'cities seront plucked down in temps d'guerre; pur ceo que ceo est pur le commonwealth chescun poit faire sans aver action." This alleged right is affirmed in Chitty on the Prerogative. (4) The *Case of Saltpetre* (5) declares the opinion of all the judges in

(1) Year Book, 8 Edw. IV. H. 41.
(2) Year Book, 21 H. VII. T. 27b.
(3) Year Book, 14 H. VIII. pl. 16.
(4) Book 4, par. 5.
(5) 12 Rep. 13.

1607 that there is in the Crown a right of entry on all lands for a purpose essential for defence, though the purpose originated within the time of legal memory. That is to say, the right is not limited to cases in which it has from time to time been exercised. Not the nature of the user but the fact of necessity is the decisive consideration which governs the right. In my opinion the law was before the Defence Acts and now is that in case of necessity for public defence the Crown may of right enter upon the land of the subject and may remain in occupation while the necessity continues. This Court so decided in *In re A Petition of Right* (1), and I think that the observations of Lord Parker in *The Zamora* (2) indicate the concurrence of the noble and learned Lord in the view of the law expressed in that decision.

The answer of the suppliants to the claim made under the prerogative was, first, that whatever rights of the kind in question existed at common law—not admitting them—such rights have been abrogated by modern legislation. Reliance was placed upon a series of enactments, temporary measures enacted at intervals in the period from 4 Hen. 8 to 38 Geo. 3, and, among permanent Acts, the Defence Acts, 1842 to 1875, but more particularly the Defence Act, 1842. That an Act of Parliament may determine once and for all an ancient right of the Crown could not be disputed. Many rights under the prerogative in respect of defence have been abolished by statute. The legislation of the reign of Charles II. was cited, and the argument is well illustrated by numerous Acts of older date relating to purveyance. All these statutes however were specifically directed against the prerogative powers with which they dealt. The rights of the Crown are not taken to be abated by statute unless the intention of the Legislature to that effect is clear and unmistakable upon the face of the statute. See per Lindley L.J. in *Wheaton* v. *Maple & Co.* (3) There must be express words or plain and necessary implication: *Coomber* v. *Berks Justices.* (4) It is probably not too strong a statement that the implication

(1) [1915] 3 K. B. 649.
(2) [1916] 2 A. C. 106.
(3) [1893] 3 Ch. 48, 64.
(4) (1883) 9 App. Cas. 61, 66.

C. A
1919
DE KEYSER'S ROYAL HOTEL, LD., *In re.*
DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.
Duke L.J.

will not be made unless otherwise the legislation would be unmeaning. (Per Day J. in *Gorton Local Board* v. *Prison Commissioners.* (1)) That the temporary statutes, including 38 Geo. 3, c. 27, can be supposed to affect the prerogative seems to me impossible. And there is nothing in the language of the Defence Act, 1842, which suggests to me an intention on the part of the Legislature to deprive the Crown of any of its common law powers. All the clauses are enabling clauses, and none of them goes beyond the objects expressed in the title and the preamble—namely, the vesting and purchase of lands and hereditaments. The words "lands and hereditaments" must be taken to include interests therein. I am of opinion that the powers of the Crown under the prerogative are not abated by any of the temporary Acts which were cited or by the Defence Act, 1842.

Para. 2 of the answer and plea of the Attorney-General on behalf of the Crown justifies the possession complained of not only by the prerogative but also by the powers conferred by the Defence of the Realm Consolidation Act, 1914, and the regulations thereunder. The terms of s. 1 of this Act of 1914 are therefore material for consideration. The section declares the powers of the Crown in terms which appear to me to affirm the existence of prerogative rights, but it also confers new powers undefined by particular description and absolute in character. The effect of s. 1 was considered in the House of Lords in *Rex* v. *Halliday* (2), a case dealing not with right in property but with the liberty of the subject. The absolute nature of the powers reposed in the Crown by the section is clear in the light of the judgments there delivered. The powers must of course be exercised honestly by those entrusted with them by the Crown, but "there is no . . . . other limit upon the acts that the regulations may authorise" (per Lord Wrenbury (3)). Regulation 2, made under the absolute powers of the Crown declared or conferred by s. 1 of the Act of 1914, provides that it shall be lawful for the competent naval or military authority where for the purpose

(1) (1887) [1904] 2 K. B. 167 n. (2) [1917] A. C. 260.
(3) [1917] A. C. 307.

of securing the public safety or the defence of the realm it is necessary so to do (*a*) to take possession of any land, and (*b*) to take possession of any buildings. The terms of s. 2 of the statute were relied upon by the suppliants' counsel as a constructive limitation of the powers declared in s. 1; but I see no reason in s. 2 for supposing that the Legislature intended to fetter the powers declared and conferred in s. 1 by imposing any of the conditions which regulate the acquisition of land under the Defence Act of 1842. The effect of the words in the regulation—"where it is necessary"—does not properly arise for consideration in this case, as the suppliants have not challenged the action of the Crown on the ground of absence of necessity. An argument was founded, however, on these words in furtherance of a suggestion that possession without compensation cannot be necessary for the defined purposes. I cannot construe the words as having any relation to the question of compensation. So far as the Crown itself is concerned the fact of necessity seems to me to be incontestably established by the determination of the Crown. It could not be challenged even by petition of right to recover possession except with the assent of the Crown. The view which I have expressed as to necessity is, I think, that taken by Lord Parker in *The Zamora*. (1) Confirming the declaration of the law which was made in this court in *In re A Petition of Right* (2) Lord Parker uses these words: "Those who are responsible for the national security must be the sole judges of what the national security requires."

Before I pass from the question of the existence in the Crown of powers for the occupation of land other than those of the Defence Acts 1842 to 1875 and the Military Lands Acts, I think it worth while to mention that in s. 1 of the Defence of the Realm (Acquisition of Land) Act, 1916, the Legislature takes notice of the fact that during the present war possession of land has been taken by the Crown for purposes connected with the war "in exercise or purported exercise of prerogative

(1) [1916] 2 A. C. 77, 107. (2) [1915] 3 K. B. 649.

C. A. 1919 — De Keyser's Royal Hotel, Ld., *In re.* — De Keyser's Royal Hotel, Ld. *v.* The King. — Duke L.J.

rights" as well as under powers conferred by enactments relating to the defence of the realm.

It would be pedantic in an argument such as occurs in this litigation to ignore the reflections naturally provoked by insistence upon prerogative rights at a time when most of the relations of the subject with the Crown have for centuries been determined by statute and when large powers outside the prerogative have been created by statute in regard to the particular matter. That consideration relates, however, to public policy and not to legal right. Any restriction of clear powers of the executive Government in times of public peril is properly subjected to careful scrutiny. Powers which under conditions of personal autocracy might be regarded as invidious may under modern conditions be not only valuable but essential. Parliament is well able to prevent an oppressive exercise of such powers by the executive.

The several grounds of claim in respect of which the suppliants ultimately asked for judgment were these, an implied agreement giving a right to recover reasonable payment for use and occupation, a common law right to compensation for loss caused by any exercise of the prerogative, and a right to have the same pecuniary advantages which would have resulted to them from the exercise of the powers of the Crown under the Defence Act, 1842.

Before dealing in detail with these claims I propose to consider what are the powers of the High Court of Justice in respect of demands made against the Crown by petition of right. This process is available to the subject for the recovery of real or personal property which is wrongfully in the possession of the Crown, and for obtaining judicial authority for payment out of the Exchequer of money due upon contractual obligations of the Crown. As to the former of these classes of objects, Holt C.J. pointed out in the discussion in the *Bankers' Case*, reported as *Rex* v. *Hornby* (1), that the function of a petition of right is "to destroy the King's title." As to the second class, the decision of the House of Lords in the *Bankers' Case* (1), as applied by the Court

(1) 5 Mod. 29, 57; 14 How. St. Tr. 34; Skinner, 608.

of Queen's Bench, in *Thomas* v. *The Queen* (1), establishes the authority of English Courts of law to examine upon petition of right money claims of the subject against the Crown, provided they arise ex contractu. The jurisdiction declared in *Thomas* v. *The Queen* (1) extends to the ascertainment of the rights of the subject against the Crown in respect of contracts broken by the officers of the Crown as well as in respect of contracts performed. Beyond these two classes of cases the jurisdiction of the Courts upon petition of right does not extend. Speaking generally, the long series of enactments from the statute of Westminster the Second—13 Edw. 1, c. 24—to the Judicature Act, which confer a large part of the powers exercised daily by the Courts of this country, do not give any rights to the subject as against the Crown. The amendments made by the Petition of Right Act, 1860, are amendments of procedure only, and are coupled with a proviso in s. 7 that "nothing in this statute shall be construed to give to the subject any remedy against the Crown in any case in which he would not have been entitled to such remedy before the passing of this Act."

In the present case the suppliants are not proceeding under the jurisdiction the Court has to restore possession of property. They seek to recover payment of a debt upon one or other of the grounds of claim on which they rely.

The claim of the suppliants for money due for use and occupation was in my opinion rightly disallowed by the learned judge at the trial. An agreement for such a payment cannot be implied where the occupation which is relied upon has been had against the will of the claimant or where the circumstances are inconsistent with a contract for payment. See *Churchward* v. *Ford* (2) and *Sloper* v. *Saunders*. (3) The facts of the case, as I have already stated them, show that this ground of claim cannot prevail.

The claim of the suppliants that an entry upon land in the exercise of the prerogative of the Crown always gives a right to compensation was not supported by reference to any

(1) L. R. 10 Q. B. 31. (2) 2 H. & N. 446.
(3) (1860) 29 L. J. (Ex.) 275.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING. — Duke L.J.

authority, but was said to be warranted by the past practice of the Crown and by necessary presumption. In the case of *The Zamora* (1), however, Lord Parker expressed his opinion that " the municipal law of this country does not give compensation to a subject when land or goods are requisitioned by the Crown." The same view appears in the old cases with regard to necessary entry upon land for defence. Counsel for the suppliants cited statutes and text-books on subjects such as purveyance, the requisition of ships, and the requisition of vehicles, and relied much upon a variety of documents produced from the Record Office which showed payments by the Crown for lands acquired under statutory powers with right of compensation or purchased or rented. No instance appeared in these documents of payment upon any claim such as is made in the present case, or indeed, of the occurrence of such a claim. It is the fact that when prerogative rights existed which have been abolished by statute, they, in some cases, carried with them at the time of their abolition certain customary or common law rights on the part of the subject to receive payment in respect of the exercise of the prerogative. The origin of every such right on the part of the subject can, I believe, be traced. The course of events in such cases is well illustrated by the history of the Royal prerogative with regard to the impressment of ships. Selden in his famous treatise on the Maritime Rights of the Crown (Mare Clausum, ed. 1636, c. 20), sets forth writs issued during a period commencing with the reign of King John, which seem to be in a common form, and which direct the impressment of ships without provision for payment. The Rolls of Parliament show that in many successive reigns this compulsory service without a legal right to payment, or with such payment only as the Crown might direct, was recognized by the House of Commons as a burdensome but lawful obligation of ship-masters, and one for which some relief ought to be devised. For instance, in 1347 (21 Edw. 3)—Parliament Rolls 2, p. 172—the House of Commons by an address to the Crown represents

(1) [1916] 2 A. C. 100.

"that whereas shipmen are assessed to all taxes and tallages, nevertheless their ships are taken and sometimes lost without reward to them, and by long continuance of such losses English shipping is in danger of being destroyed." To the prayer that the King "will be pleased to ordain a remedy" the King replies: "Le roi l'avisera." There is a like transaction in 1371, and in 47 Edw. 3 the King upon petition that compensation might be given to shipowners for necessary repairs and renewal of masts and rigging replies: "Tiel regard nad pas este fait avant les heures." A like representation was made in 2 Rich. 2 (Parliament Rolls 3, p. 46) without effect, but upon a renewed address in the following year (Parliament Rolls 3, p. 66*a*) there is the record of an ordinance by the Crown that when ships are arrested for the service of the King they shall have their reward for each quarter of a year 3s. 4d. per ton and that this ordinance shall continue till the next Parliament. The continuance or discontinuance of payment under this provision is the subject of memorials in the same reign and in the reigns of Henry IV. and Henry V. (Parliament Rolls 3, pp. 223*a*, 253, and 554; Parliament Rolls 4, p. 79*a*), and the payment is ultimately described in the Parliament Rolls as customary. Selden's statement of the case in Mare Clausum shows that in Stuart times the practice of payment had become established, and that when ships were impressed for the Royal Navy congrua merces esset praestanda. Ultimately (as counsel for the present suppliants pointed out) statutes were passed making impressment of ships without payment illegal. The distinction between statutes of this kind and the statutes dealing with entries by the Crown upon land of the subject is that none of these latter statutes renders illegal an entry by the Crown under any pre-existing right.

Assuming the occupation of the suppliants' premises by the Crown to be an occupation by virtue of the Royal prerogative, I am of opinion that such an occupation does not of itself create or raise the presumption of a right in the suppliants to have compensation assessed to them. The reasons for this opinion extend to claims in respect of an

C. A. 1919 — De Keyser's Royal Hotel, Ld., *In re.* De Keyser's Royal Hotel, Ld. *v.* The King. — Duke L.J.

occupation under the Defence of the Realm Consolidation Act, 1914, s. 1, taking the view which I take as to the effect of s. 2. Payment is, I think, left at the discretion of the Crown.

There remains the claim of the suppliants under the Defence Act, 1842. Sect. 1, sub-s. 2, of the Defence of the Realm Consolidation Act, 1914, empowers His Majesty in Council to provide by regulation for "the suspension of any restrictions on the acquisition or user of land, or the exercise of the power of making bye-laws or any other power under the Defence Acts, 1842 to 1875, or the Military Lands Acts, 1891 to 1903." Regulation 17 (*a*) made in November, 1914, is an exercise of the authority so provided in respect of the making of bye-laws. No regulation has been made to suspend the restrictions on the acquisition or user of land under the several Acts mentioned in the section. Regulation 2, on the other hand, gave an unqualified power to the competent naval and military authorities to take possession of land and buildings for purposes of public safety or the defence of the realm during the war. Regulations have been made providing for the assessment of compensation in respect of some acts done under the powers of the Act of 1914 in derogation of the rights of the subject. So far as regards the exercise generally of the exceptional powers of the Crown, during the war, the only provision which has been made is that contained in the Royal Commission. Regulation 8 (*c*) was discussed before us as being possibly a reference to hearing before the Commission as "the manner in which . . . . claims for compensation under these regulations are determined." I do not know whether this is its true meaning, and it is not necessary to form an opinion on the subject. No regulation made under the statute of 1914 purports to create any right to compensation in respect of the occupation of land or to provide any means of assessing compensation for lands taken, in place of the means provided in the Act of 1842. It was contended that in the interests of justice (in the popular sense) the possession of the Crown must be "deemed to be" acquired under the Act of 1842. The suppliants might have raised

this contention, relevantly if erroneously, upon a motion for a writ of mandamus to the Army Council to take the necessary proceedings for an assessment of compensation, but I believe there is no authority for holding that, in the absence of such proceedings, and of an award of compensation thereunder, there is any debt due from the Crown to the suppliants which one of His Majesty's judges can direct to be paid out of the Exchequer. To say that the Ministers of the Crown must be "deemed" to have proceeded under the Act and that a liability results as matter of law, is to set up a ground of claim founded upon a legal fiction. As between subjects this is permissible. As between subjects and the Crown the rule seems to apply which was laid down by the unanimous decision of the judges in *Sheffeild* v. *Ratcliffe* (1), that the King is not bound by legal fictions.

The decision of this Court in *In re A Petition of Right* (2) is, I think, opposed to all the contentions of the suppliants under the Acts of 1842 and 1914.

To dispose of one remaining question in the case, it is necessary to consider whether if the suppliants had rights and no effective remedy, under their main contentions, they could maintain a claim analogous to that which arises between subject and subject in respect of a breach of statutory duty which causes damage. Examination of the authorities upon actions on the case (see *Edgcomb* v. *Dee* (3); *Miller* v. *Taylor* (4)) shows that such a claim is a pure claim for damages for a wrong, and could not be maintained against the Crown.

On the whole, I am of opinion that the case of the Crown is made out, that the suppliants have not the rights for which they contend, and that if they had in fact had the grievance complained of under the Defence Act, 1842, there is no jurisdiction in any judge to redress it by a judgment on a petition of right.

I sincerely regret the difference of opinion which has obliged me to deal at length with a subject of much complexity,

(1) (1616) Hob. 334; Jenkins, 287.
(2) [1915] 3 K. B. 649.
(3) (1670) Vaugh. 89, 101.
(4) Tidd's Practice (6th ed.), 963; Tidd's Forms (6th ed.), 379.

C. A. 1919 — DE KEYSER'S ROYAL HOTEL, LD., *In re.* — DE KEYSER'S ROYAL HOTEL, LD. *v.* THE KING.

and as I think of great importance, with regard to national defence and to the relative rights of the subject and the Crown.

Solicitors for the appellants: *Miller & Smiths.*
Solicitor for the Crown: *The Treasury Solicitor.*

G. A. S.

C. A. 1919 — *May* 27, 28.

PATENT CASTINGS SYNDICATE, LIMITED *v.* ETHERINGTON.

[1918 P. 804.]

Company—Manager's Remuneration—Agreement—Construction—Commission on "net profits"—Deduction of Excess Profits Duty—Finance (No. 2) Act, 1915 (5 *& 6 Geo.* 5, *c.* 89), *ss.* 35, 40, 45, *sub-s.* 3.

By an agreement dated October 30, 1916, the defendant was appointed works manager of the business of the plaintiff company at a salary. The company agreed also to pay him at the end of each business year of the company, and within seven days of the holding of the annual general meeting, a further sum by way of commission being a percentage upon the "net profits" for the year. There was a proviso that the certificate of the company's auditor should be conclusive as to what constituted net profits at the end of any such business year:—

Held, on construction, that "net profits" of the business for the year were the excess of the receipts for the year over the current expenses and outgoings of the same year—i.e., the fund which for that year was capable of being lawfully applied by the company to the payment of a dividend.

Held, as matter of law, that that fund could only be arrived at after deducting excess profits duty, which was a debt of the company to the Crown.

Held, therefore, that the commission ought to be calculated after deduction of excess profits duty.

Held, also, that (for the present purpose) no analogy between the incidence of income tax and that of excess profits duty exists.

Collins v. *Sedgwick* [1917] 1 Ch. 179 and *In re Condran* [1917] 1 Ch. 639 approved and followed.

Thomas v. *Hamlyn & Co.* [1917] 1 K. B. 527, *William Hollins & Co.* v. *Paget* [1917] 1 Ch. 187 distinguished and explained.

S. J. & E. Fellows, Ld. v. *Corker* [1918] 1 Ch. 9 overruled.

Decision of Younger J. [1919] 1 Ch. 306 affirmed.

C. A. 1919

PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.

APPEAL from a decision of Younger J. (1)

By an agreement dated October 30, 1916, between the plaintiff company and the defendant (thereinafter called the works manager), the defendant was appointed works manager of the business of the company for a period of five years and four months from November 1, 1916. Clause 5 provided: "The company shall pay to the works manager during the continuance of this agreement and provided he shall duly observe and perform the agreements herein on his part contained the salary at the rate of 500*l.* per annum for the first year of his employment hereunder, at the rate of 550*l.* per annum for the second year of his employment hereunder, at the rate of 600*l.* per annum for the third year of his employment hereunder, at the rate of 650*l.* per annum for the fourth year of his employment hereunder, and at the rate of 700*l.* per annum for the fifth and any subsequent year of his employment hereunder, such salary to be payable by equal monthly payments on the first day of each month in every year without any deduction, the first payment to be made on December 1, 1916. And shall also pay to the works manager at the end of each business year of the company during the continuance of this agreement and within seven days of the holding of the annual general meeting a further sum by way of a commission, such sum to be made up as follows: (1.) 5 per cent. upon the net profits for the year (if any) of the said business up to 5000*l.* and (2.) $7\frac{1}{2}$ per cent. upon such net profits for the year as exceeds 5000*l.*," with a proviso that "for the purposes of calculating such commission as aforesaid the certificate of the auditor of the company for the time being as to what constitute the net profits (if any) as aforesaid at the end of any such business year of the company during the continuance of this agreement shall be binding and conclusive upon the works manager."

On June 25, 1918, the company took out this summons to determine whether upon the true construction of the agreement for the purpose of calculating the amount described in clause 5 as "a further sum by way of a commission," and

(1) [1919] 1 Ch. 306.

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.

agreed to be paid to the defendant "at the end of each business year," the "net profits" referred to in the clause ought for such year to be ascertained (*a*) after deducting, or (*b*) without deducting any excess profits duty payable by the plaintiffs in or in respect of such year.

Younger J. held, on the construction of the agreement, that "net profits" of the business for the year were the excess of the receipts for the year over the current expenses and outgoings of the same year—i.e., the fund which for that year was capable of being lawfully applied by the company to the payment of a dividend; and, further, as matter of law, that that fund could only be arrived at after deducting excess profits duty, which was a debt of the company to the Crown. He accordingly held that the commission ought to be calculated after deduction of excess profits duty.

The works manager appealed.

Disturnal K.C. and *Bremner* for the appellant. The question is whether before arriving at the net profits of a business excess profits duty is to be deducted. On this point there has been a considerable difference of judicial opinion. The matter must, it is submitted, be determined on the construction of the agreement; and it is, therefore, necessary to look at what are its exact terms. It is submitted that "net profits" in this agreement are net profits in the ordinary sense, namely, those profits which the company earns, and that out of those profits the company pays the excess profits duty in the same way as it pays income tax. Younger J. was wrong in drawing a distinction between excess profits duty and income tax. By s. 38, sub-s. 1, excess profits duty is charged on the amount by which the profits of the particular accounting period exceeds the pre-war standard of profits. The amount of the excess profits duty cannot be determined until the profits of the company have been ascertained. Sub-s. 3, which provides for recoupment of excess profits duty in succeeding years in the case of loss in trade, is important as showing that the account between a trader and the Government is never closed. The account between the

company and their works manager might therefore be kept open after his agreement of service with them had expired, a result which it is submitted could not have been in the contemplation of the parties. By s. 40, sub-s. 1, the profits arising from a trade or business are to be determined on the same principles as the profits and gains of the trade or business are to be determined for the purpose of income tax. In each case the profits have to be ascertained out of which excess profits duty on the one hand, and income tax on the other, have to be deducted. Profits are calculated by accountants according to certain well-established conventions. But this cannot be done where the calculation is for the purpose of tax. Profits in that case must be calculated according to strict rules. The judge below founded his decision on s. 45, sub-s. 3, which provides that the amount of duty payable shall be recoverable as a debt due to His Majesty from the person on whom it is assessed. His course of reasoning was that excess profits duty was in the nature of a debt due from the trader, and was, like any other debt, deductible from the total receipts before the profits could be ascertained. But the judge forgot that income tax is deductible in the same way. It is charged on the person, and the Crown has various ways given it of attaching the tax. See s. 172 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35), and s. 111 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19). It is submitted, therefore, that Younger J. was wrong in drawing the distinction he did between excess profits duty and income tax. One is just as much a debt as the other. If the provisions of Sched. D to s. 100 of the Income Tax Act, 1842, are compared with those of s. 38 of the Act of 1915, it will be seen that the two schemes there provided for levying the taxes are precisely similar. Both taxes are to be assessed and levied in respect of profits.

The provision in s. 35 for allowing a deduction of the amount paid as excess profits duty for the purpose of income tax was necessary in order to prevent double taxation. There is no fundamental distinction for the present purpose between the incidence of income tax and that of excess profits duty.

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.

The remuneration here is to be based on profits without reference to any deduction from them for the purpose of tax. The words "net profits" are used in contradistinction to "gross profits," which are profits without taking into consideration the costs of labour and establishment charges. In the case of a company the Crown levies the income tax upon the company, but the company has power to deduct it from the dividends paid to the shareholders. In some of the cases it has been said that the company pays as the agent for the shareholders. In a sense the shareholder pays a proportionate amount of the income tax on the dividend he receives. The agreement in this case was in the nature of a profit-sharing scheme between the company and its servant. The net profits are really the only profits of a business. No prudent accountant would allow a company to distribute its profits without making an allowance for doubtful debts, but the Crown would not allow this to be done in the case of a tax.

[WARRINGTON L.J. There may now be a valuation of doubtful debts under the Income Tax Act, 1853 (16 & 17 Vict. c. 34), s. 50.]

The present case was dealt with in the Court below entirely on the basis of the agreement. No evidence was given and no auditor's certificate produced.

In *Attorney-General* v. *Ashton Gas Co.* (1), where by a special Act of a gas company it was provided that the profits divisible in any year amongst the ordinary shareholders should not exceed a given rate, it was held that in calculating the rate of dividend income tax ought to be included. The fallacy underlying the argument on behalf of the company in that case was that the profits were arrived at after deducting income tax, but as was pointed out by Buckley J., income tax is part of the profits and not a deduction before arriving at them. That decision was affirmed by the House of Lords sub nom. *Ashton Gas Co.* v. *Attorney-General.* (2) The principle there laid down, that income tax was part of the net profits available for dividends, was followed in *Johnston*

(1) [1904] 2 Ch. 621. (2) [1906] A. C. 10.

v. *Chestergate Hat Manufacturing Co.* (1) Those cases form the basis of the appellant's contention in this case, and it is for the respondents to distinguish them by showing that excess profits duty is an expense which may be deducted before the profits are ascertained.

Taking the cases on excess profits duty in their order of date, the first is *Collins* v. *Sedgwick* (2), in which it was held that for the purpose of ascertaining profits excess profits duty was not analogous to income tax, and that excess profits duty must first be deducted.

[EVE J. In that case Mr. Ashworth James contended in argument that excess profits duty was in fact a licence duty payable in war-time to the Government, and was recoverable as a Crown debt by virtue of s. 45, sub-s. 3. I have not seen that view referred to in any of the judgments.]

The question involved is whether excess profits duty is an expense incurred in earning the profits.

[WARRINGTON J. What we really have to determine in this case is whether "net profits" means what is distributable among the shareholders. Was not the object of the agreement to give the works manager a definite proportion of what was divisible among the shareholders?]

No; the efforts the works manager put into the business were not confined to any one particular year, but went to build up the business and increase the accumulated value of the goodwill.

William Hollins & Co. v. *Paget* (3) is exactly in point. It was there held that the excess profits duty was a contribution to the Exchequer of a proportion of the company's profits standing on much the same footing as the income tax, and ought not to be deducted before ascertaining the profits on which the manager's commission in that case was to be calculated.

In *Thomas* v. *Hamlyn & Co.* (4) the plaintiff was engaged as a manager of four of the numerous branches of the defendants' business, his remuneration being a commission

(1) [1915] 2 Ch. 338.
(2) [1917] 1 Ch. 179.
(3) [1917] 1 Ch. 187, 192.
(4) [1917] 1 K. B. 537, 530.

C. A. 1919 — PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.

of 15 per cent. of the net profits of those four businesses treated as a whole, and it was held that the excess profits duty could not be deducted in computing the net profits upon which the plaintiff was entitled to receive a commission. It is true that in that case the profits were those of four of the branches only, but we rely on the statement in the judgment of Rowlatt J. that "It is contended that the excess profits duty is not income tax; but, except that there are variations in the method of computation, I cannot see what else it is but an income tax." If excess profits is an expense, it is difficult to see why it could not have been apportioned amongst the four branches.

In *In re Condran* (1) Peterson J. followed his previous decision in *Collins* v. *Sedgwick*. (2) The sole question argued in those cases was whether excess profits duty was an expense to be deducted before ascertaining the profits, or whether, as we contend, it was part of the profits themselves. Large profits may be earned in a business in respect of which excess profits duty is not chargeable provided they do not exceed the pre-war standard of profits or 200*l*. beyond them.

In *S. J. & E. Fellows, Ld.* v. *Corker* (3) Neville J. held that the excess profits duty was not to be deducted from the profits of the company before calculating the managing director's commission on the net profits of the company.

To sum up, it is submitted that profits are really the difference between the gross profits and the expenses incurred in earning those profits. Taxes like income tax and excess profits duty are chargeable in respect of those profits. Younger J. in this case has accepted the view as regards income tax that it could not be treated as an outgoing, but has wrongly, it is submitted, drawn a distinction between income tax and excess profits duty. It is submitted, therefore, that his judgment is wrong in treating excess profits duty (1.) as a debt, and (2.) as an outgoing.

Clauson K.C., *J. C. Mathew K.C.* and *J. M. Gover K.C.* for the respondents. The question in this case is one as to

(1) [1917] 1 Ch. 639. (2) [1917] 1 Ch. 179.
(3) [1918] 1 Ch. 9.

the construction of this particular agreement, and is an easy one until the analogy of income tax is introduced. The agreement is one between a works manager and the shareholders, acting through their directors, under which a fund, which would otherwise be divisible amongst the shareholders, is to be divided between the works manager and the shareholders in certain proportions. Income tax is paid by the shareholders as citizens. Excess profits duty is paid by the company qua company. All the provisions of the Act of 1915 are consistent with this idea. Whoever carries on a business and realizes profits above a certain amount has to pay the duty. Rule 1 of Part I. of the Fourth Schedule to the Act of 1915 shows what was in the mind of the Legislature. Rule 2 indicates a considerable departure from the principle of the Income Tax Acts in that it does not allow deductions for interest on money borrowed for the purpose of the trade or business. By r. 4, "Deductions shall not be allowed on account of the liability to pay, or of the payment of, income tax or excess profits duty, but a deduction shall be allowed (if not otherwise allowed by means of the adoption of the principle of the Income Tax Acts) for any sum which has been paid in respect of the profits on account of any excess profits duty or similar duty imposed in any country outside the United Kingdom." That rule is significant as showing that any duty analogous to excess profits duty paid in another jurisdiction is to be treated as an outgoing. It further shows that excess profits duty is an outgoing.

As to the agreement itself, "net profits" and profits available for distribution are indistinguishable expressions. Excess profits duty is an outgoing which everyone who carries on a business has to pay. A trader cannot carry on a business beyond a certain magnitude without incurring a liability to pay the tax. It is a penalty which a citizen has to pay for carrying on a business; a duty imposed on the persons carrying on the business.

[DUKE L.J. That comes very near to Mr. Ashworth James' definition of it as licence duty for carrying on the business.]

In *Port of London Authority* v. *Orsett Union Assessment*

C. A. 1919 — PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.

Committee (1) it was held that a rating authority, when assessing the rateable value of a hereditament capable of earning profits, such as a dock, was entitled to take into consideration the liability of the occupiers to pay excess profits duty. In that case Darling J. expressed the view that the hypothetical tenant was entitled to take into consideration the excess profits duty when fixing the rent which he could afford to pay.

It is unnecessary to again go through the cases, which have been already fully dealt with.

The meaning of net profits is quite plain if the suggested analogy of income tax to excess profits duty is not introduced. That analogy, it is submitted, is wholly misleading.

[DUKE L.J. Income tax is a personal expense and not an expense of the concern.]

The decision of Rowlatt J. in *Thomas* v. *Hamlyn & Co.* (2) was right on the facts of that particular case, but the opinions expressed in his judgment were wrong.

The decision of Neville J. in *S. J. & E. Fellows, Ld.* v. *Corker* (3) may possibly be right on the facts of that particular case. The profits that the company was there dealing with was an artificial fund created by them. It is submitted however that the reasoning on which his judgment proceeded cannot be supported.

Disturnal K.C. in reply. It is said that the matter is confused by introducing the analogy of income tax, and that income tax is paid by a person as a citizen and not as a citizen carrying on a business. But if the Income Tax Acts are looked at it will be seen that that is not accurate. Income tax is paid in respect of profits and gains or of lands.

[WARRINGTON L.J. What Mr. Clauson means is that you have not only to look at the business but at the position of the individual.]

A company has to pay income tax on its profits notwithstanding that particular shareholders may get an abatement on the amount of the income tax on their dividends.

(1) [1919] 1 K. B. 84, 93. (2) [1917] 1 K. B. 527.
(3) [1918] 1 Ch. 9.

As to the distinction contended for between income tax and excess profits duty, it is said that excess profits duty is a duty on the business which the company cannot throw upon the shareholders. Even if income tax can be recovered from the shareholders it is by express deduction. In the case of excess profits duty the Crown takes a share of the profits from the company, and the company has therefore less to distribute among the shareholders. The burden is thrown upon the shareholders in the same manner as in the case of income tax. The question that has to be considered is whether excess profits duty is part of the profits or an expense incurred in earning them.

Port of London Authority v. *Orsett Union Assessment Committee* (1) was a rating case, and therefore has no direct bearing on the point now under consideration, although it is true that in the course of his judgment Avory J. expressed an opinion that excess profits duty was part of the profits of the business.

WARRINGTON L.J. The question raised by this appeal is what is the true meaning of the expression "net profits" in an agreement made between the plaintiff company and the defendant, their works manager, providing as part of his remuneration for payment to him of a commission of a certain percentage of the net profits of the business for the year. The defendant, the appellant, contends that the expression denotes the balance of trading profits over trading expenses properly so called, and that excess profits duty not being such an expense cannot be deducted in order to arrive at that balance. The plaintiffs, on the other hand, contend that the expression "net profits" means in such an agreement as this that sum which is available for distribution among the shareholders of the company as dividend, and that that sum does not include excess profits duty, which is money payable not to the shareholders but to the Treasury. Younger J. has adopted the plaintiffs' view, and the defendant appeals.

(1) [1919] 1 K. B. 84, 96.

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON. Warrington L.J.

There is no question about the facts. We have simply to construe the agreement in question. That agreement is dated October 30, 1916, and was made, therefore, after the coming into operation of the Finance (No. 2) Act, 1915, whereby excess profits duty was imposed. [His Lordship read the material provisions of the agreement and continued :] One would have thought that in dealing with a business agreement of this kind, made between a company and their servant for the division of the net profits of the company between themselves and their servant in certain proportions, what the company would be intending to divide between themselves and their servant, and that in which they were proposing to give the servant an interest, would be what belonged to themselves, and not a sum of money which did not belong to themselves, but was payable to another person, namely, in the case of excess profits duty to His Majesty's Treasury. If that is the true view then the meaning of the expression "net profits" would be that balance shown by the result of the year's trading which would be properly distributable amongst the shareholders as dividend. There are certain provisions in the agreement which seem to me strongly to point in that direction. The first is that the payment is to be made within seven days of the holding of the annual general meeting. The chief purpose of the annual general meeting of the company is to present to the shareholders the accounts of the previous year's trading, showing what sum is as a result of that trading divisible amongst them as dividend, and to resolve how much, if any, of that sum is to be actually distributed as dividend. Then again there is the provision that the certificate of the auditor, whose business it is to audit those accounts, is to be conclusive as to the amount of the net profits. All that seems to me to point to the conclusion that what the company and their servant were contemplating by this agreement was the giving to the servant as part of his remuneration a proportion of that sum distributable as profits which but for that provision would be distributable or distributed according to the will of the company amongst its shareholders by way of dividend.

It is said however that excess profits duty is of such a nature that what would appear to be the natural construction of the agreement cannot be given to it so far as excess profits duty is concerned, but that the amount of that duty must be included in the net profits for the purpose with which we are concerned. It is, therefore, necessary to look at the statutory provisions by which excess profits duty is imposed. These are contained in Part III. of the Finance (No. 2) Act, 1915, beginning with s. 38. By sub-s. 1 of that section the duty is imposed in these terms: "There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after the 4th day of August 1914, and before the 1st day of July 1915, exceeded, by more than 200*l*., the pre-war standard of profits . . . . a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess." The amount of the percentage has since been altered, but that is immaterial for the present purpose.(1) Then it is provided in s. 40, sub-s. 1, that "The profits arising from any trade or business to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act," that is to say, you are not to take the income tax returns, and say "These are the profits for this purpose"; you are separately to assess them, but you are to ascertain the profits "on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act." I need not refer to these modifications; it is sufficient to say with regard to them, that they show in many respects how the Legislature is distinguishing between excess profits duty and income tax. The only other provision relating to this matter to which it is necessary to refer for the moment is

(1) By the Finance Act, 1916 (6 & 7 Geo. 5, c. 24), s. 45, sub-s. 2, the rate of excess profits duty was increased to sixty per cent., and by the Finance Act, 1917 (7 & 8 Geo. 5, c. 31), s. 20, sub-s. 2, the rate of duty was further increased to eighty per cent.

C. A.
1919
PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.
Warrington L.J.

that contained in s. 45, which shows how, and upon whom—and that is the important point—excess profits duty is to be assessed. Sub-s. 1 of the section provides that the excess profits duty is to be assessed by the Commissioners of Inland Revenue, and sub-s. 2 is in these terms: "The duty may be assessed on any person for the time being owning or carrying on the trade or business or acting as agent for that person in carrying on the trade or business, or, where a trade or business has ceased, on the person who owned or carried on the trade or business or acted as agent in carrying on the trade or business immediately before the time at which the trade or business ceased. . . . ." It is to be assessed, therefore, not on the persons ultimately entitled to divide the profits of the trade or business, but on the persons who own or carry on the business, that is to say, in the case of a company, on the company itself. Then sub-s. 3 provides that "The amount of duty payable shall be recoverable as a debt due to His Majesty from the person on whom it is assessed." It is, therefore, recoverable from the company itself, but in no case is it recoverable from the individual shareholders who are entitled to divide that part of the profits of the company which is divisible as dividend. Of course, the shareholders receive so much less profit than they would otherwise receive by reason of the fact that this duty has to be paid, but unlike income tax they do not themselves directly pay, or become liable to pay, any part of this excess profits duty. Those are the provisions contained in Part III. of the Act relating to excess profits duty itself, but there is another provision which is of considerable importance in Part II. of the Act which deals with income tax, and it is material that that provision comes in that part of the Act, and not in that part which imposes excess profits duty itself, and describes the circumstances under which it is to be assessed, levied and paid. The provisions to which I am referring are contained in s. 35, sub-s. 1: "Where any person has paid excess profits duty under this Act the amount so paid shall be allowed as a deduction for the purpose of income tax in computing the profits and gains of the year which

included the end of the accounting period in respect of which the excess profits duty has been paid"; that is to say, that for income tax purposes excess profits duty is a deductible outgoing of the business entirely unlike income tax itself. Then the sub-section continues "but where any person has received repayment of any amount previously paid by him by way of excess profits duty, the amount repaid shall be treated as profit for the year in which the repayment is received," that is to say, the payment of excess profits duty is to be treated as an outgoing for the purpose of income tax, and the amount repaid for overpaid excess profits duty is to be treated as a receipt and as part of the profits of the year in which the repayment is received. That last provision refers to sub-s. 3 of s. 38, which provides for the repayment or set off in a subsequent year of excess profits duty where it is shown there has been a loss in the trade or business, or that the profits have not reached the point which involves liability to such duty. It simply means that so far as the taxpayer and the Treasury are concerned the account is one that is kept open from year to year, but, with all respect to the arguments which have been addressed to us, it seems to me that the provision does not affect the question we have to determine, owing principally to the provision to which I have referred in s. 35 bringing any repayment into the account of profit and loss for the year in which it is received.

What light, if any, do these statutory provisions throw upon the construction of this agreement? In my judgment they only throw this light, that, unlike income tax, excess profits duty is not a part of the profits which is payable to the company carrying on the business, or to its shareholders. Excess profits duty is, for the purpose of ascertaining what is payable to the shareholders of the company, an outgoing, a sum of money which has to be paid to a third person as a debt of the company, and is therefore an outgoing which has to be paid before it can be ascertained what are the profits distributable amongst the shareholders of the company by way of dividend.

In my judgment there is nothing in the statutory provisions

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON. Warrington L.J.

imposing excess profits duty which renders it impossible or improper to give the agreement that construction which I think it ought to bear, namely, as I have already said, a provision for the payment to the company's servant of a part of that which, but for that provision, would be distributable amongst the shareholders as dividend. In my opinion, the judgment of Younger J. was correct, and the appeal ought to be dismissed.

Before, however, parting with the case it is necessary that I should say a few words about some of the previous cases which have been cited to us. First with regard to the first of the two cases which deal with the true nature of income tax, namely, *Attorney-General* v. *Ashton Gas Co.* (1) There the decision was simply this, that a company which declares a dividend free of income tax is in fact paying to its shareholders not merely the dividend which it so declares at a certain rate per cent. on its shareholders' capital, but it is also paying income tax because the income tax is part of the profits and has to be borne by the shareholder who receives his dividend. The simple point which was there decided was that a dividend of 10 per cent. free of income tax is in fact a dividend of 10 per cent. plus income tax, and therefore not within the statutory provisions which regulated the business of that particular company. The same point was really decided in the other income tax case of *Johnston* v. *Chestergate Hat Manufacturing Co.* (2), but having regard to the view I take of excess profits duty these cases which relate to income tax have no bearing on the question we have to determine, for the supposed analogy of income tax to excess profits duty does not exist, and arguments founded on it are misleading.

There are however some cases which deal with excess profits duty itself. First there are the two cases which came before Peterson J.: *Collins* v. *Sedgwick* (3) and *In re Condran.* (4) In both of those cases the learned judge took

(1) [1904] 2 Ch. 621; on appeal sub nom. *Ashton Gas Co.* v. *Attorney-General* [1906] A. C. 10.
(2) [1915] 2 Ch. 338.
(3) [1917] 1 Ch. 179.
(4) [1917] 1 Ch. 639.

the same view on the general question as that I have expressed, and therefore it is really unnecessary to say anything about them except that I agree with the judgments pronounced by him, and particularly with the judgment delivered by him in *In re Condran* (1), especially with those passages in it where in discussing the difference between income tax and excess profits duty he says: "Income tax is ultimately payable by the person who is entitled to receive the profits. A company pays income tax on behalf of the shareholder and the income tax payable on his dividend is treated as part of his dividend, so that if he is in fact entitled to exemption he can recover the amount of the tax from the Revenue authorities." Then a little lower down he says: "Excess profits duty on the other hand is assessed on the person owning or carrying on the business and is recoverable as a debt from him (s. 45 of the Finance (No. 2) Act, 1915), and is payable in respect of the profits of the business, and not in respect of the benefit which a shareholder or partner derives from the business"; and again a little lower down: "Nor are excess profits duty and income tax payable in respect of the same fund; for excess profits duty is for the purpose of income tax treated as an outgoing of the business which reduces the profits in respect of which income tax is assessable (s. 35 of the Finance (No. 2) Act, 1915)." All therefore I say about that case is that I respectfully concur in the decision, and I agree with the remarks made by Peterson J. With regard to *Collins* v. *Sedgwick* (2) it seems to me that that was a perfectly plain case. The decision was obviously right, because the expression which the learned judge there had to construe was "profits available for distribution," words which I think according to its true construction ought to be introduced into the present agreement. Then there are three other cases; the first of which is a decision of Eve J. in *William Hollins & Co.* v. *Paget* (3), which I think may well be supported. The facts of that case were different from those of the present. The expression "net profits" was there not used. The

(1) [1917] 1 Ch. 639, 644. (2) [1917] 1 Ch. 179.
(3) [1917] 1 Ch. 187.

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON. Warrington L.J.

expression was "profits made during the financial year," which is a different expression, and I think it may well be that that decision could stand with our present judgment. I am not sure, with all respect to my learned brother, that I quite agree with some of the remarks that he made in the course of his judgment; but that perhaps is immaterial. The next case is a decision of Rowlatt J. in *Thomas* v. *Hamlyn & Co.* (1) I will only refer to the headnote, which is quite sufficient for the present purpose: "The plaintiff was engaged as manager of four of the numerous branches of the defendants' business, his remuneration being a commission of 15 per cent. of the net profits of those four branches treated as a whole. In computing the net profits of the four branches for the purpose of ascertaining the sum due to the plaintiff for commission the defendants claimed to deduct a proportionate amount of the 'excess profits duty' payable in respect of the profits of their business:—*Held*, that the 'excess profits duty' could not be deducted in computing the net profits upon which the plaintiff was entitled to receive a commission." That case at first sight, therefore, appears to me to be a decision directly contrary to the view which I have been expressing, but when it is looked at there is one ground which by itself distinguishes it from the present case and is sufficient to support the learned judge's decision, and that ground is that the servant there was entitled to a commission not on the net profits of the business as a whole, but on the net profits of four branches only of the business. Excess profits duty is something which is payable not in respect of the profits of any branch, but in respect of the profits of the whole business. I think it might very well be said, and the learned judge in fact points that out in his judgment, that the expression net profits is not one which could properly be adopted in ascertaining what are the profits of the branches as distinct from the profits of the business as a whole. But it is quite clear that the learned judge bases his decision not only on that ground, but also on the ground that in his view, even if the business was treated as a whole, excess profits duty

(1) [1917] 1 K. B. 527.

would not be properly deducted under such an agreement as he was dealing with. With that part of his judgment I respectfully disagree, because it seems to me that that is inconsistent with what I think ought to be the construction of such an agreement as he was there dealing with, and as we are dealing with in the present case. The only remaining case to which it is necessary to refer is that before Neville J. of *S. J. & E. Fellows, Ld.* v. *Corker.*(1) I need not go through his judgment at length, but I think there is no question that the decision in that case cannot stand if this case is decided, as I think it ought to be, in favour of the respondents. He bases his judgment mainly, if not entirely, on the supposed analogy between excess profits duty and income tax, an analogy which in my opinion does not exist. With all respect to that learned judge I think that that case must, after our present decision, be treated as overruled. For the reasons I have stated I think that the appeal ought to be dismissed.

DUKE L.J. I agree. I shall only add a few words to what my Lord has said by reason of the consideration that there is some conflict of judicial decision with regard to one of the matters upon which argument has been addressed to us. I do so without prejudice to the principle that the question of construction in this case is to be decided as a question of construction, and not as a matter of analogy. The agreement here is one for the payment of a works manager by a commission payable after each annual general meeting of the company, whose manager he was. It was to be a commission of the amount of 5 per cent. of the net profits, that is, of the net profits of the year preceding the annual general meeting, seven days after which the percentage of profits was to be paid to the works manager.

It has been contended on behalf of the appellant that the net profits on which he is entitled to 5 per cent. commission is the residue of the ultimate profit of each year's operations without any deduction of excess profits duty. That

(1) [1918] 1 Ch. 9.

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON. Duke L.J.

construction has been supported as a matter of interpretation of the statute, and by reference to decisions which are said to be binding on us, especially a decision of the House of Lords in *Ashton Gas Co.* v. *Attorney-General* (1), and upon the construction of the document itself. I think it is useful to see what is the practical effect of the working out of the sum in the manner in which the appellant contends that it should be worked out. He is to have 5 per cent. of the net profits up to 5000*l.* One might well assume that in the 5000*l.* there would be 4000*l.*, which would be subject to excess profits duty. Take that to be the case. Upon the appellant's construction of the document he would be entitled to 5 per cent. of the 4000*l.*, which would be 200*l.*, but what would really remain to the company, if you put out of account the 200*l.* payable to the works manager, would be the residue of the 4000*l.* after payment of eighty per cent. to the Crown, not 3800*l.*, but 800*l.*; that is the appellant, the works manager, would receive his 5 per cent. at 20*s.* in the 1*l.*, and the respondents, the employers, would receive their ninety-five per cent. at 4*s.* in the 1*l.* That, of course, is a result to which one may be brought by force of statutory authority, or out of the proper regard of every tribunal to the decisions which are imperative in a particular case, but it does not commend itself to my mind upon the grounds of equality and rateability. I confess that before I could impute an agreement of that kind to two reasonable business people, in a commission agreement, I should want to find some clear expression in the document which provided for the commission which had that somewhat striking effect. It is said to be a matter of statutory obligation here to decide this case so that it shall produce that result, and what is first relied upon is the statute itself. The statute does not say so.

The Finance Act (No. 2), 1915, imposed a new duty, a duty of an entirely novel character computed upon a new basis and by a new mode of assessment, and with new characteristics in respect of incidence as to persons and as to business concerns. The duty created by that Act, and

(1) [1906] A. C. 10.

called excess profits duty, seems to me when closely examined to differ in every material characteristic from income tax. However, it is said to have the same statutory operation as income tax, and the line of reasoning which is followed is this: It is said that it has been held in *Ashton Gas Co.* v. *Attorney-General* (1) in the first instance in a very lucid judgment of Buckley J., now Lord Wrenbury, and afterwards in the House of Lords, that the profit of a business concern is what is left after all the necessary expenses to earn that profit have been paid, that is, the receipts less working expenses. That is not what the House of Lords did decide. It is not what Lord Wrenbury said, and it is not what Lord Halsbury said. What Lord Halsbury stated was that "the profit upon which income tax is charged" is what is left after all the necessary expenses to earn that profit have been paid, which I venture to think is a totally different matter. I say no more with regard to the statute of 1915 than that it does not in express terms, and in my judgment it does not in effect, create an additional income tax, and it does not provide that the incidence and operation of the tax which it does create, shall be in all respects identical with the incidence and operation of the income tax. One very remarkable characteristic of the Act of 1915 is this: that by s. 35 it provides that profits within the meaning of the term in s. 134 of the Income Tax Act, 1842, shall not include the profits, or the share of profits, part of the income of the taxpayer which are in question in this case, because the payment in respect of excess profits duty is to be deducted in arriving at income tax. To my mind, s. 35 by itself is sufficient to negative the proposition that the intention of the Legislature in the provision with regard to excess profits duty in the Act of 1915 was to create a new income tax.

Then with regard to the authorities; I have referred to the decisions upon income tax, decisions as to which there is not the least question in this case. The respondents accept them and the appellant relies upon them. My own impression is that the appellant, although he relies upon

(1) [1906] A. C. 10; [1904] 2 Ch. 621.

C. A. 1919 — PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON. — Duke L.J.

them, does not accept them quite so implicitly as the respondents. Other decisions were referred to which are more directly in point, and I do not propose with regard to them to add many words to what Warrington L.J. has said; my respectful view with regard to those decisions is that, with the exception of the last of the decisions relied upon by the appellant, namely, that of Neville J. in *S. J. & E. Fellows, Ld.* v. *Corker* (1), the decision in each case can be justified by the particular facts of the case. They were decisions upon agreements, none of which was the same as this agreement, either in its legal effect or in its terms, or in its obviously necessary operation. But with regard to the decision of Neville J., I concur in the view which has already been expressed. I think it cannot stand with the decision of the Court in this case. With respect to the judgment of Peterson J. in *In re Condran* (2), I respectfully adopt the line of reasoning by which the learned judge arrived at his decision, which proceeded upon the same grounds as the decision of the Court in the present case.

I will only add one or two words upon the construction of the document itself. The agreement was one between the works manager and the representatives of the shareholders of the company for an apportionment of a certain fund at the time of the annual general meeting of the company. Reference has already been made to the purpose for which an annual general meeting is held. I think the fund which was to be apportioned between the works manager and the shareholders was a fund which represented in truth the residue of the earnings of the company in the year which was available for distribution as between the company and its works manager, in such a sense that the part retained by the company should be capable of distribution among the several shareholders, or of retention by the company among its proper assets, to be dealt with in such manner as its directors should think fit, and that the 5 per cent. which was to go to the works manager was to be equally his property. I think it was to be a distribution in fact of a divisible residue of profits, and

(1) [1918] 1 Ch. 9. (2) [1917] 1 Ch. 639.

that it was to be a rateable distribution. To my mind, when you find that the result of the process sought to be applied by the appellant is the extraordinary result that instead of 20*s.* in the 1*l.* in each case, there is 20*s.* in the 1*l.* on one side and 4*s.* in the 1*l.* on the other, you find a direct condemnation of the argument upon which the appeal in this case depends. I would only like to add that although this was stated to be a friendly appeal, it was argued with the resolution and thoroughness with which it was expected that the counsel who were engaged in the controversy should conduct it.

EVE J. The expression "profits of the business" is one of ambiguous import. It may mean, and when used in contra-distinction to net profits I should say it does mean, the credit balance on the company's trading account. On the other hand, it is not infrequently used in the same sense as "net profits," and occasionally it is employed to describe the proportion of net profits available for distribution as dividend. "Net profits," on the other hand, is an expression of more definite signification. It means, in my opinion, the residuum of profit after the discharge of all current expenses and outgoings in respect of the period under consideration. In other words, it is the ultimate balance of the gross profit which is capable of being lawfully divided as dividend. Although I do not think that any additional force is given to the expression by the addition of such a phrase as "available for distribution," or of such a provision as we find in this agreement, that the certificate of the auditor is to be conclusive as to the amount of the net profits, the addition of such a phrase and the inclusion of such a stipulation demonstrate that the expression is intended to be used in its primary sense, and in my opinion that is the sense in which it is used in this agreement. When that conclusion is arrived at, it seems to me to follow inevitably that the decision of the learned judge below is correct. I am not prepared to say that each of the other cases to which our attention has been directed, other than that of *S. J. & E. Fellows, Ld.*

C. A. 1919 PATENT CASTINGS SYNDICATE, LD. v. ETHERINGTON.

v. *Corker* (1), cannot be supported on the construction of the particular agreements that had to be considered in those cases, but I agree that there are expressions in two of the judgments, including my own in *William Hollins & Co.* v. *Paget* (2), which require reconsideration in the light of subsequent decisions, and what has fallen from my Lords to-day.

Appeal dismissed.

Solicitors for the appellant: *John B. & F. Purchase.*

Solicitors for the respondents: *Mackrell, Maton, Godlee & Quincey.*

W. I. C.

EVE J. 1919 *March* 24, 25, 26, 27, 28; *April* 4.

LAW *v.* CHARTERED INSTITUTE OF PATENT AGENTS.

[1917 L. 1518.]

Judicial Inquiry—Domestic Forum—Patent Agent—Chartered Institute—Removal of Name from Membership—Board of Trade Inquiry—Accusers as Judges—Bias—Injunction—Register of Patent Agents Rules, 1908, *rr.* 17, 19.

A person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to lead a reasonable man to suspect that he may have such a bias.

The council of the defendant institute having received a complaint from the Admiralty as to the alleged disclosure by the plaintiff of a secret naval invention, referred the matter to its Discipline Committee to ascertain if the plaintiff, who was a member of the institute, had been guilty of "disgraceful professional conduct" under rule 31 of their charter. They formulated certain allegations against the plaintiff, and then applied under rule 19 of the Register of Patent Agents Rules, 1908, for a Committee of the Board of Trade with the view of securing the erasure of the plaintiff's name from the Register of Patent Agents. This procedure ultimately failed, and the council then proceeded under rule 32 of their charter upon the same allegations. By that rule, if any member of the institute was held by the council, on the complaint of any person

(1) [1918] 1 Ch. 9. (2) [1917] 1 Ch. 187.

aggrieved, and after having had an opportunity of being heard by the council, to have been guilty of any act discreditable to a patent agent, he should be liable to expulsion from membership of the institute. At the meeting when his conduct was to be investigated the plaintiff, by his counsel, objected to the jurisdiction of the council in so far as it was composed of members who had taken any active part in the previous proceedings. This was overruled by the President and the plaintiff and his counsel retired from the meeting. The council then passed resolutions to the effect that the plaintiff had been proved guilty of acts discreditable to a patent agent, and should be excluded from membership of the institute. In an action by the plaintiff for a declaration that the resolutions were invalid and ultra vires, and for an injunction :—

Held, that the liability of an offending member under rules 31 and 32 was cumulative and not alternative, and that the application to the Board of Trade did not per se debar the council from considering the same complaint as a ground for exercising their powers under rule 32.

But *held*, that the council, in the investigation under rule 32, had acted in performance of a judicial duty, as both accusers and judges, and therefore the resolutions for the expulsion of the plaintiff from membership of the defendant institute must be declared invalid and ultra vires, and the defendants restrained by injunction from acting upon them.

ACTION WITH WITNESSES.

The plaintiff, John Arthur Law, was a registered patent agent, and was elected a Fellow of the defendant institute on February 16, 1899. On December 20, 1917, the council of the institute passed resolutions to the effect that in their opinion the plaintiff had been guilty of acts discreditable to a patent agent, that he should be excluded from membership of the institute, and that a circular letter should be sent forthwith to all Fellows, Foreign Members and Associates, informing them of the plaintiff's exclusion.

On December 24, 1917, the plaintiff commenced this action, wherein he claimed a declaration that the resolutions were invalid and ultra vires, and an injunction restraining the institute from acting thereon and excluding him from membership, and the rights, privileges and benefits attendant on membership.

The circumstances which gave rise to the action occurred in 1915, when Martin Hale, who was a client of the plaintiff's, invented an aerial bomb for the purpose of attacking submarines. He was in communication with the Admiralty about that and other inventions of his. The Submarine

EVE J. 1919 LAW v. CHARTERED INSTITUTE OF PATENT AGENTS.

Attack Committee of the Admiralty communicated to M. Hale a sketch of a hydrostatic fuse which could be inserted in bombs, and which was the invention of two Admiralty officers. In the specification filed by the plaintiff at the Patent Office and sent to the Admiralty by M. Hale, he made use of this hydrostatic fuse. By a letter of July 22, 1915, to M. Hale, the Admiralty pointed out that the fuse shown in a drawing attached to the specification was of the same design as that communicated to him by the Submarine Attack Committee, and the Admiralty considered that they were justified in requesting him to delete all reference to this fuse from the specification and drawing, as such fuse could not form any part of his invention. They also informed him that no publication or divulgation of the particulars of these investigations must be allowed to take place in any country during the war unless with the consent of the Admiralty. All reference to the fuse was accordingly deleted.

On July 27, 1915, the plaintiff forwarded to the Board of Invention and Research of the Admiralty a description of another invention made by Jacob Longman, an assistant and client of his, and with it were sent certain illustrative sketches. This invention was for an anchored mine to attack submarines, and was an adaptation of a German patent for a submarine mine published after the outbreak of the war in a paper, a copy of which had been obtained by J. Longman from Switzerland. Before forwarding the description of this invention to the Board of Invention and Research, the plaintiff had lodged, on behalf of J. Longman, a provisional specification relating to his invention, which contained a description in general terms of a hydrostatic fuse, but without any illustrative sketches. The illustrative sketches sent to the Board had been prepared by J. Longman, and in so doing he had made use of a copy of the drawing of the Government hydrostatic fuse, which had been given to the plaintiff by M. Hale, and discussed at a meeting when J. Longman was present. The drawing of the Government fuse had been modified by J. Longman to make it applicable to his invention, and to illustrate to the Admiralty how the invention could

be carried out by their own apparatus. Neither the plaintiff nor J. Longman ever considered that there was any secret about the fuse. In lieu of the Government fuse, any other hydrostatic fuse or a time-fuse could have been provided.

By a letter of December 20, 1915, the Admiralty requested the plaintiff to delete all reference to a fuse from the application for a patent, and stated that the hydrostatic fuse embodied in the apparatus was identical with the one invented by naval officers and was a secret Admiralty invention communicated in confidence to M. Hale. After a lengthy correspondence the application for this patent was not proceeded with. By a letter of April 25, 1916, the Admiralty wrote to the secretary of the Chartered Institute detailing the circumstances of the inclusion of the hydrostatic fuse in the specification of J. Longman's invention, and stating that a grave breach of trust had been committed. They requested that the matter might be brought to the notice of the Discipline Committee of the Chartered Institute. This was accordingly done, and the council decided to refer the matter to the Board of Trade, and the Discipline Committee were directed to employ solicitors to prepare the case for the Board of Trade and conduct it. By a letter of June 16, 1916, the solicitors of the Chartered Institute sent to the plaintiff and to the Board of Trade certain enclosed allegations against the plaintiff and Jacob Longman, and applied on behalf of the institute for the appointment of a Committee of the Board of Trade, under rule 19 of the Register of Patent Agents Rules, 1908, upon the ground that the plaintiff and J. Longman had been guilty of disgraceful professional conduct as set forth in the enclosed allegations. These allegations were: "That you, John Arthur Law, have been guilty of disgraceful professional conduct, in that

"1. You permitted your assistant, Jacob Longman, to utilise, in connection with his application for a patent, No. 10,831, of 1915, an invention, being a fuse, with which, to your knowledge, the said Jacob Longman had become

EVE J.
1919
LAW
v.
CHARTERED INSTITUTE OF PATENT AGENTS.

acquainted only in his professional capacity as assistant to yourself.

"2. That you permitted the said Jacob Longman to use for his own benefit information imparted to him privately, and in his professional capacity as your assistant, by a client of yours, one Martin Hale.

"3. That you permitted the said Jacob Longman to include in his specification particulars of a fuse, all reference to which, as you know, your client Martin Hale had been instructed by the Admiralty to remove from his specification, on the ground that it was an Admiralty invention, and had been communicated to the said Martin Hale in confidence by Naval officers.

"4. That you put forward to the Lords of the Admiralty a request on behalf of the said Jacob Longman for remuneration in respect of his invention, although you knew it to comprise a modification of an invention upon his knowledge of which he was not entitled, as you knew, to found any application for remuneration."

The manner in which these allegations were dealt with by the Chartered Institute, under rules 31 and 32 of their charter, culminating in the resolutions for the exclusion of the plaintiff therefrom, and the other material facts and correspondence, sufficiently appear from the judgment of the Court. The material parts of the clause in the charter relating to the general objects of the institute, and of rules 31 and 32 of the charter, and by-law 13, were as follows (1):

(1) Cl. 2: "The objects of the Institute are . . . . to promote the education, status and training of Patent Agents, and to maintain a high standard of rectitude and professional conduct and knowledge, and generally to do all things incidental or conducive to the above objects, or any of them."

31. "The rule next hereinafter set forth shall be deemed to be a fundamental rule of the Institute (viz.):—

"If any Member of the Institute shall be convicted in Our Dominions or elsewhere of an offence which if committed in England would be a felony, or if the name of any Member being entered on the Register of Patent Agents shall, by order of Our Board of Trade, be erased from such Register by reason of such conviction, or by reason of his having been after due enquiry proved to the satisfaction of Our said Board to have been guilty of disgraceful professional conduct. . . . . Such person shall de facto cease to be a Member of the Institute."

The plaintiff and Jacob Longman gave evidence of their dealing with the patent containing the hydrostatic fuse, and Martin Hale deposed to what had taken place in regard to his invention, and stated that in his view the drawing shown to the plaintiff did not disclose any Admiralty secret, and he made no complaint against the plaintiff in respect of what he had done. He had told the plaintiff that the fuse was inserted in the aerial bomb at the suggestion of the Admiralty, and that no claim could be made to it.

Maugham K.C., *Gordon K.C.* and *Fairfax Luxmoore* for the plaintiff. There have been misunderstandings throughout the proceedings. The defendant institute having first proceeded under rule 31 of their charter to procure the exclusion of the plaintiff from membership of the institute by means of proceedings before the Board of Trade, and having failed, then proceeded under rule 32, making the same charges against him. The plaintiff cannot, it is submitted, be tried twice over for the same alleged offence. That is contrary to justice. Rules 31 and 32 are alternative not cumulative. The latter rule must be set in motion by a person aggrieved, and here

---

32. "If any person while he is a Member of the Institute is held by the Council on the complaint of any Member of the Institute, or of any person aggrieved, and after having had an opportunity of being heard by the Council, to have been guilty of any act or default discreditable to a Patent Agent, ... he shall be liable to be excluded from Membership, or to be suspended for any period not exceeding two years from Membership by a resolution of the Council passed at a Meeting specially convened for that purpose, with notice of the object, at which Meeting there shall be present and vote not less than eight Members of the Council and for which exclusion or suspension not less than three-fourths of those present and voting shall vote, and the Member having first had an opportunity of being heard. . . . ."

By-law:—

13. "Before exercising against any Member the powers of exclusion or suspension conferred on them by the Charter the Council shall cause the Member to be informed by letter of the grounds of such proposed exclusion or suspension. He shall be invited to show cause in writing against his suspension or exclusion within fourteen days, or any longer period which the Council may allow, or to show cause in person at a Meeting of the Council on a day to be named, in default of which, or failing an explanation in their judgment satisfactory, the Council shall have power to proceed to exclusion or suspension as provided by the Charter. . . . ."

EVE J. 1919 LAW v. CHARTERED INSTITUTE OF PATENT AGENTS.

the complaint was by the Admiralty. M. Hale had no grievance. On the inquiries which took place, the important fact is that there was no evidence that either the plaintiff or J. Longman knew that this fuse was a secret. The principle of the hydrostatic fuse was well known, and a time-fuse would have done equally well.

Our main point is that this inquiry under rule 32 was in the nature of a judicial inquiry, and that the judges being also the accusers in the previous proceedings were biassed, and the resolutions are invalid.

Reg. v. *Allan* (1) is the leading authority on the point of a prosecutor acting as a judge. Similar cases are *Reg.* v. *Meyer* (2); *Reg.* v. *Milledge* (3); *Reg.* v. *Lee* (4); where justices of the peace were held to be disqualified to sit on the ground of bias.

Charges of alleged professional misconduct tried by a domestic forum are subject to the same considerations: *Leeson* v. *General Council of Medical Education and Registration.* (5) So in *Reg.* v. *Gaisford* (6); *Reg.* v. *Henley* (7); and *Allinson* v. *General Council of Medical Education and Registration.* (8). The members of the council by taking part in the proceedings under rule 31 have disqualified themselves from proceeding under rule 32 as their decision thereunder could not be unbiassed. The allegations were framed by the Discipline Committee, of which many of the council were members, and there was nothing left of the complaint by the Admiralty. Martin Hale made no complaint, and was not a party aggrieved. The proceeding was therefore irregular and invalid. The last ground of our complaint is that there was no evidence on which the conclusion of the council could be reasonably supported. Our contention is that the allegations were clearly disproved. The council were taking up a side against the plaintiff throughout, and their counsel acted as prosecuting counsel. The rule of professional conduct to be applied in a case of this character

(1) (1864) 4 B. & S. 915.
(2) (1875) 1 Q. B. D. 173.
(3) (1879) 4 Q. B. D. 332.
(4) (1882) 9 Q. B. D. 394.
(5) (1889) 43 Ch. D. 366.
(6) [1892] 1 Q. B. 381.
(7) [1892] 1 Q. B. 504.
(8) [1894] 1 Q. B. 750.

is to be found in *Johnson* v. *Marriott* (1); *In re Holmes* (2); and *Saunders* v. *Seyd and Kelly's Credit Index Co.* (3); which were all cases of solicitors.

Clayton K.C. and *Cecil Whiteley* for the defendant institute. With regard to the procedure under rules 31 and 32, they were really totally different proceedings: the offence was different, the penalty was different, and the tribunals were different. The two rules were, it is submitted, cumulative, and not alternative. Both could be invoked in turn, or could be proceeded with simultaneously. The only question is whether there was evidence upon which the council could act, and it is abundantly clear that there was, both from the correspondence and the admitted facts. Nothing more was needed or possible. The President of the Board of Trade found the plaintiff deserving of severe censure and of having fallen far short of the standard of honour required in one of his profession.

It would be a strong thing to say that there was no evidence to support the conclusion arrived at (*Hill* v. *Clifford* (4)), where the sufficiency of the evidence in a case of professional misconduct was considered.

With regard to the question of bias, if the objection was valid, every member of the council was disqualified. The cases cited were mainly those before public officials and magistrates who were acting in a public capacity and could not be accusers and judges as well. The complaint here was by the Admiralty, not the Chartered Institute, and it was investigated before a domestic tribunal, not a purely judicial tribunal, as in most of the cases relied on.

The Chartered Institute was asked to conduct the proceedings, and the Committee of the Board of Trade was asked to find the facts, and did so. If the evidence given by M. Hale had been before that committee it might have altered the attitude of the defendants. The fact that M. Hale personally was not "a person aggrieved" is no answer

(1) (1833) 2 Cr. & M. 183.
(2) (1877) 25 W. R. 603.
(3) (1896) 75 L. T. 193.
(4) [1907] 2 Ch. 236.

EVE J. 1919 LAW v. CHARTERED INSTITUTE OF PATENT AGENTS.

to the defendant's case. In any case those words in rule 32 are mere surplusage, and may be ignored.

Maugham K.C. in reply.

Cur. adv. vult.

April 4. EVE J. (after summarizing the resolutions complained of, and the plaintiff's claim, continued :) This case is of grave importance to the plaintiff and of more than passing interest to a body of professional men who perhaps hardly realize the limits to which the Legislature has gone in committing questions involving their professional status and their conduct as professional men to the final arbitrament of a Government department.

The alleged misconduct of the plaintiff on which the resolutions I have summarized are based was the subject of a complaint communicated to the institute by the Admiralty in a letter of April 25, 1916. This letter, with certain correspondence which accompanied it, was fully considered at a meeting of the council held on May 5, 1916, whereat the following resolutions were passed : (1.) That the case be referred at once to the Board of Trade. (2.) That Mr. Law be informed that the council has sent to the Board of Trade the allegation made by the Admiralty against himself, and has asked for a Committee of Inquiry, and that meanwhile any action which the council may think fit to take as regards Mr. Law's fellowship is held over until the Board of Trade has decided. (3.) That the matter be referred to the Discipline Committee with power to act and an instruction to employ Messrs. Radford & Frankland to prepare the case for the consideration of the Board of Trade and to conduct the same. Later in the day the Discipline Committee met and decided upon the counsel to be employed and that the plaintiff should be asked to admit the correspondence.

On June 16 Messrs. Radford & Frankland as solicitors for the institute forwarded to the plaintiff and the Board of Trade a document headed " Chartered Institute of Patent Agents and John Arthur Law Fellow of the Chartered Institute of Patent Agents Registered as a Patent Agent

on the 16th February, 1899, Allegations," in which it was alleged "That you John Arthur Law have been guilty of disgraceful professional conduct in that," and then followed certain charges enumerated in four separately numbered paragraphs. The letter enclosing this document applied on behalf of the institute for the appointment of a committee upon the ground that the plaintiff had been guilty of disgraceful professional conduct as set forth in the allegations.

This application was made—as it could only be made—under the Register of Patent Agents Rules, 1908 (dated December 17, 1907), and although in form it applied for the appointment of a committee it was in substance an application to the Board under rule 19 for the erasure of the plaintiff's name from the Register. The rules make no provision for an application for the appointment of a committee simpliciter, and indeed Messrs. Radford & Frankland in their letter to the Board of June 16 stated in terms that they were applying under the rule I have mentioned.

The effect of this procedure was, in my opinion, to put the institute, acting by the council, in the position of prosecutors or accusers. They had not only taken it upon themselves to conduct the case put forward by the Admiralty, and for that purpose had collected the charges of misconduct which they considered were to be deduced from a somewhat inconsequent and rather leisurely conducted correspondence and reduced them into a series of formal allegations, but, having so done, they had elected themselves to apply to the Board to erase the plaintiff's name from the Register on the ground that he had been "guilty of disgraceful professional conduct as set forth in the allegations" so prepared. It is difficult indeed to think of anything more they could have done up to this point as accusers or prosecutors.

But the matter does not rest there. I have listened to very lengthy extracts from the proceedings before the committee which was duly appointed and sat for the inquiry on January 16 and 25, 1917, and it is quite impossible to come to any other conclusion therefrom than that the institute were there throughout to support the application, to prove

EVE J.
1919
LAW
v.
CHARTERED INSTITUTE OF PATENT AGENTS.

the allegations, and to obtain, if they could, a report from the committee which could lead to but one result. And in this they were to a certain extent successful, for on April 18, 1917, the Board of Trade notified the plaintiff that they had received and considered the report of the committee and were satisfied therefrom that the first and second allegations made against him had been substantiated, and that he had been guilty of disgraceful professional conduct deserving of the severest censure, and that the Board would have no other course open to them than to order the erasure of his name from the Register unless, within fourteen days from the date of that communication, they received from him a letter containing a suitable apology to the Lords Commissioners of the Admiralty, and an undertaking to the Board that the offences proved against him should not be repeated.

The plaintiff was unwilling to give any such apology or undertaking, and after some further correspondence induced the President of the Board of Trade to reconsider the matter, with the result that on November 13, 1917, the President wrote to the plaintiff expressing his opinion that the plaintiff's conduct was deserving of severe censure and fell far short of the standard of honour which he expected from members of the plaintiff's profession, and adding that as the circumstances did not require him to take the extreme step of directing the removal of the plaintiff's name from the Register he refrained from finding the plaintiff guilty of disgraceful professional conduct.

In the result therefore the application under rule 19 for the erasure of the plaintiff's name from the Register failed, and rule 31 of the institute's charter became inoperative to determine the plaintiff's membership.

The letter of the President of the Board of Trade was considered by the council at a meeting held on December 4, 1917, whereat it was resolved that the following letter should be sent by the secretary to the plaintiff: "Sir, A special meeting of Council on July 3, 1917, under Section 32 of the Charter and by-law 13 considered the question of your

exclusion or suspension and adjourned. The meeting will be resumed here at 2 p.m. on Thursday, December 20. You are invited, in accordance with by-law 13, to show cause against your exclusion or suspension within 14 days, or to show cause in person at the meeting on December 20 above referred to. The grounds for your exclusion or suspension are that you have been guilty of acts discreditable to a Patent Agent as set forth in the allegations sent you on June 16, 1916, and in my letter to you of May 19, 1917." The letter was duly sent, the allegations therein mentioned being the identical ones laid before the Committee of Inquiry.

On December 20 the plaintiff attended the adjourned council meeting with his counsel and solicitor. Objection was at once taken to the jurisdiction of the tribunal to adjudicate on the matter in so far as it was composed of members of the council who had taken any active or substantial part in the previous proceedings. To this it was replied by the president that the objection, if sustained, would preclude the whole council from sitting. Mr. Ransford, the honorary secretary, volunteered the statement that he had taken a substantial part in the proceedings, and added that he would sit but not vote at that meeting. The objection was again pressed and an adjournment asked for, partly because Mr. Gordon, who had appeared for the plaintiff before the committee, had been called away from London on public business, and partly to enable the institute to furnish the plaintiff's advisers with the names of the Discipline Committee who had dealt with the matter in May, 1916; but after a general discussion the president of the council announced that there would be no adjournment, that Mr. Ransford would sit in order to bring the matter before the council but would not vote, and that the proceedings would then commence. Counsel again protested, and after informing the council that the plaintiff would seek the protection of this Court withdrew with the plaintiff and his solicitor.

There were fourteen members of the council present, ten of whom, including Mr. Ransford, were present at the council meeting, and six of whom, again including Mr. Ransford,

EVE J. 1919 LAW v. CHARTERED INSTITUTE OF PATENT AGENTS.

were present at the Discipline Committee meeting respectively held on May 5, 1916, when the application to the Board of Trade and the procedure in connection therewith were resolved upon.

After the departure of the plaintiff and his advisers the council first resolved "that having considered allegations 1 and 2, and correspondence in support thereof, and having considered the fact that neither Law nor his advisers attempted to traverse either of these allegations the council are of opinion that it is unnecessary to consider the case further"; and then proceeded to pass the three further resolutions to which this action relates. The several resolutions were supported by the votes of thirteen members, Mr. Ransford refraining from voting on any of them.

On these undisputed facts the plaintiff claims that the resolutions are invalid on three grounds, first, because the council, having unsuccessfully applied to the Board of Trade under rule 31 of the charter, could not proceed to rehear the matter on the same complaint under rule 32; secondly, because the council, composed in part of persons who had taken a substantial share in the previous proceedings, were disqualified from adjudicating on allegations substantially brought forward by themselves; and thirdly, because there was no evidence by which the conclusion arrived at by the council could be reasonably supported.

I do not think the first of these objections can be maintained. The liability of an offending member under rules 31 and 32 is in my opinion cumulative not alternative. The former deals with matters of public policy, with applications and proceedings to which the institute need be no party, and with jurisdictions in which the institute has no locus standi; the latter, on the other hand, embodies a term of the contract of membership and regulates the conditions and manner on and in which membership may be determined or suspended by the domestic forum. In my opinion both rules are capable of being invoked in the case of an offending member, and the investigations thereunder may proceed simultaneously or in either order of priority. I hold, therefore, that the application

to the Board of Trade did not per se debar the council from considering the same complaint as was used to support that application as a ground for exercising their powers under rule 32.

But the investigation under rule 32, with which I am alone concerned in this action, involves an inquiry of a judicial nature.

Each member of the council in adjudicating on a complaint thereunder is performing a judicial duty, and he must bring to the discharge of that duty an unbiassed and impartial mind. If he has a bias which renders him otherwise than an impartial judge he is disqualified from performing his duty. Nay, more (so jealous is the policy of our law of the purity of the administration of justice), if there are circumstances so affecting a person acting in a judicial capacity as to be calculated to create in the mind of a reasonable man a suspicion of that person's impartiality, those circumstances are themselves sufficient to disqualify although in fact no bias exists. One such circumstance which has always been held to bring about disqualification is the fact that the person whose impartiality is impugned has taken part in the proceedings, either by himself or his agent, as prosecutor or accuser. As Bowen L.J. says in *Leeson* v. *General Council of Medical Education and Registration* (1): "If he is an accuser he must not be a judge," and the question whether he has not been an accuser is one of fact to be determined in each particular case. Lord Esher M.R. puts it thus: "The crucial question is whether in substance and in fact one of the judges has in truth also been an accuser": *Allinson* v. *General Council of Medical Education and Registration.* (2)

That question of fact I have already dealt with. I am inclined to think the president was right when he said the objection to jurisdiction went to the disqualifying of all the fourteen members of the council present on December 20, but it is not necessary to determine this inasmuch as the tribunal was largely made up of members who in substance and in fact constituted themselves prosecutors and accusers

(1) 43 Ch. D. 384. (2) [1894] 1 Q. B. 758.

EVE J.
1919
LAW
v.
CHARTERED INSTITUTE OF PATENT AGENTS.

when they determined to apply to the Board of Trade and deputed to their agents the formulation of the charges and the conduct of the proceedings to establish the truth of the same.

It was argued on behalf of the defendants that the council —if accusers at all—were accusers before another tribunal and in an inquiry which involved a different issue, or at any rate different consequences to the accused, and that these factors so distinguish the case from any of the reported decisions relied on as to make them inapplicable here. I cannot accept that argument as sound: to do so would be to disregard the principle underlying the decided cases. I have endeavoured to indicate what that principle is and am perhaps only repeating myself when I say it is this, that a person who has a judicial duty to perform is disqualified from performing it if he has a bias which renders him otherwise than an impartial judge, or if he has so conducted himself in relation to the matters to be investigated as to create in the mind of a reasonable man a suspicion that he may have such a bias.

Applying that principle to the facts of this case it is, in my opinion, impossible to deny that the conduct of the council in preferring and supporting the charges against the plaintiff before the Board of Trade would be calculated to raise in the mind of a reasonable man grave doubts of their ability to conduct with impartiality a judicial investigation into the truth of the selfsame charges—doubts which I may remark in passing are by no means dispelled on a perusal of the memorandum with which Mr. Ransford had armed himself for the purpose of bringing the matter before the council on December 20, and into which he had introduced a reference to a matter—so utterly irrelevant as to make the reference to it approach the malicious.

I hold, therefore, that the resolutions of December 20 of which the plaintiff complains were wholly invalid and ultra vires on the ground that the council as then constituted had no jurisdiction to adjudicate on the matters on which the resolutions are based, and on this finding the plaintiff is of course entitled to judgment in the action.

But the plaintiff is—perhaps naturally—not content with this somewhat inconclusive result, and his counsel have struggled hard to convince me that there was no evidence before the council on which as reasonable men, and assuming them for this part of the case to have been an unbiassed tribunal, they could have reached the conclusion at which they arrived on December 20. I cannot so hold. They had before them all the materials on which the Board of Trade and the president had proceeded, and these materials with the findings of the Board and the president were, in my opinion, evidence on which they might act in considering and determining the case. It is impossible to say that there was no evidence to support the finding that the two charges had been established. See *Hill* v. *Clifford*. (1)

But although I cannot in any way review, and indeed have no right to express any opinion of my own upon, the findings of the Board or the president or the determination of the council I am, I think, entitled to say this much, that evidence has been adduced before me for the first time which the experienced counsel who conducted the case for the institute before the Committee of Inquiry has frankly admitted might and probably would have materially altered the attitude of his clients at that inquiry had it been then produced.

I was very glad to hear that admission because I cannot help thinking that Mr. Hale's evidence puts a different complexion on the whole matter. I do not pause to examine his evidence in detail, but I do not accept the view that its effect only comes to this, that he individually makes no complaint against the plaintiff. I think it goes very much further than that towards removing all cause of complaint against the plaintiff.

At the conclusion of the evidence the defendants were invited, in view of the additional evidence produced at the trial, to put an end to this long-standing dispute without further discussion, but they did not see their way to accept the invitation, and in declining it expressly asked the Court for some indication of the way in which similar cases ought

(1) [1907] 2 Ch. 236.

EVE J.
1919
LAW
v.
CHARTERED INSTITUTE OF PATENT AGENTS.

to be dealt with in the future. But for that request I should not add another word to what I have already said. As I read the charter the primary duty of the institute is to its members and to the profession of which it is the recognized and organized representative. Although its services are naturally largely made use of by the Board of Trade it is not and certainly ought not to become a creature of the Board, nor do any of its objects contemplate its undertaking the duties of an obsequious handmaid of the Board.

When an accusation of disgraceful professional conduct is made against a member of the profession (and I am only dealing with cases similar to this one where the accusation is made by a third party) it occurs to me that the first duty of the institute is to extend its protection to the accused and to assist him so far as it can to vindicate himself, or at least to require his accusers—however august they may be—to come into the open and make good, if they can, the accusations they have launched against him.

I confess I am quite unable to understand the attitude of an association, formed for the protection of the honour of a profession, which so far from assisting its members to repel an attack (which after all may be an unjust one) allows itself and its resources to be used to conduct the attack, and if possible to secure a conviction. I should have thought the successful assertion of the innocence of an individual member and the vindication of his character would have been at least as much calculated to advance the objects of the institute as stated in cl. 2 of the charter as a successful prosecution undertaken at the instigation of persons or bodies outside the profession, who have no real concern with the honour of the profession, but who are of course only too willing to transfer to the institute the burden of proving—if it can—the charges they have made.

I do not take the view that the institute was ever established to be so made use of in cases of the class I am alone considering, that is to say, cases in which the accusations involve an application to the Board of Trade under the Patent Agents Rules.

There must, however, be many cases in which for many different reasons the institute cannot take an active part in defending an accused member—but this state of things does not in my opinion result in its having to choose between the alternatives of undertaking the prosecution or standing aside altogether. There is—even under such conditions—much that it can do to fulfil its main purpose. Applications under rule 19 involve the honour and jeopardize the whole professional prospects if not the very livelihood of the respondent. They are referred by the Board of Trade for hearing and inquiry to a committee selected by the Board but not necessarily composed of individuals with any judicial or other appropriate qualifications. The committee conducts its investigation in private; it has of course no power to compel the attendance of witnesses or to insist on the production of documents; it cannot administer an oath, and has apparently no rules of procedure to guide it; it communicates no findings or decision to the parties; it makes a report to the Board which is conclusive as to the facts, but of which no copy is furnished to accuser or accused; and on this report the Board exercises the powers conferred upon it by rule 17, and there is no appeal.

A late Lord Justice—one of great learning and wide experience—Lord Justice Farwell—once stated that he could not trust the whole bench of bishops to do justice under such conditions. With a respect for the episcopate as profound as that of the Lord Justice I entirely adopt his language. I share to the full his distrust of justice administered by a tribunal sitting in private unassisted and untrammeled by the salutary rules regulating procedure and the admission of evidence obtaining in these courts, uncontrolled by the invigorating and corrective criticism provoked and stimulated by publicity, and finally wrapping up its findings in a secret communication to the department which appointed it.

I respectfully suggest to the governing body of this institute, established with the primary object I have indicated, that if for any reason they cannot defend a member arraigned before such a tribunal, they can at least see to it that the

EVE J. 1919 LAW v. CHARTERED INSTITUTE OF PATENT AGENTS.

peril in which he stands and the risk he runs are reduced to a minimum by their vigilant insistence at every stage of the proceedings on the cardinal principle underlying every criminal or quasi-criminal prosecution, that it is for the accuser to prove his case, not for the accused to establish his innocence, and that until the accuser has proved his case the accused is deemed to be and ought to be treated as an innocent man.

I am constrained to add that in this case the institute in its precipitance to relieve the Admiralty of their responsibilities as the accusers of the plaintiff, appear to me to have overlooked some of the considerations I have referred to.

The plaintiff is entitled to the declaration and injunction he claims, and the defendants must pay the costs of the action.

Solicitors : *Guedalla & Jacobson ; Radford & Frankland.*

G. M.

P. O. LAWRENCE J. 1919 *May* 15, 16, 21 ; *June* 5.

In re MOUNTGARRET.

MOUNTGARRET *v.* INGILBY.

[1919 M. 303.]

Will—Construction—Real Estate—Successive Limitations to unborn Persons—Estates for Life or in Tail—Gift Over—Remoteness—Cy-près Doctrine.

The 13th Viscount Mountgarret by his will devised his Irish estates upon trusts for his son H. B. for life, remainder for his (the testator's) grandson S. B. for life, remainder for "his first and other sons in tail male for the respective terms of their respective lives successively and in remainder one after the other so that such son only as shall be entitled to and bear the title of Viscount Mountgarret shall be entitled to such rents and profits and in default of such issue upon trust as hereinafter set out for the holder for the time being of the Mountgarret title and in the event of such title becoming extinct," then upon trust for the testator's right heirs living at the death of the last holder of the said title. The will contained a residuary devise. The Mountgarret title was created by King Edward VI., who conferred it upon R. B. and the heirs male of his body.

The testator died in 1900 and H. B. became the 14th Viscount. He was twice married. By his first marriage in 1868 he had one son only, namely, S. B.; and by his second marriage in 1902 he had one child only, the plaintiff.

H. B. died in 1912, and S. B. became the 15th Viscount and died without issue in 1918. On the death of S. B. the plaintiff became the 16th Viscount, and questions arose as to what interest he took under the will of the 13th Viscount in the Irish estates:—

Held, that the true effect of the devise was to create estates in tail male and not merely life estate in the first and other sons successively of the 15th Viscount, and consequently that the gift over in default of his male issue was not void for remoteness.

Doe v. *Stenlake* (1810) 12 East, 515 and *Hugo* v. *Williams* (1872) L. R. 14 Eq. 224 followed.

Held, also, that the gift over in default of issue male of the 15th Viscount, upon its true construction and in the events that had happened, operated as a gift to the plaintiff and the heirs male of the body of the 1st Viscount, under which the plaintiff, as heir male of the body of the 1st Viscount by lineal descent, took an estate in tail male descendible or transmissible not only to the heirs male of his body but also (on failure of such issue) to collateral relatives who were heirs male of the body of the 1st Viscount.

ADJOURNED SUMMONS.

Henry Edmund 13th Viscount Mountgarret by his will made in September, 1896, devised real estates in Ireland to trustees upon trust for the use of his son Henry Edmund Butler (afterwards the 14th Viscount) during his life and from and after his death upon trust for the use of his (the testator's) grandson Edmund Somerset Butler (afterwards the 15th Viscount) during his life "and after his death upon trust for the use of his first and other sons in tail male for the respective terms of their respective lives successively and in remainder one after the other so that such son only as shall be entitled to and bear the title of Viscount Mountgarret shall be entitled to such rents and profits and in default of such issue upon trust as hereinafter set out for the holder for the time being of the Mountgarret Title and in the event of such title becoming extinct then upon trust to convey said estates to my right heirs living at the death of the last holder of the said title and I hereby declare that in the event of any tenant for life or tenant in tail becoming bankrupt or doing any act whereby said estates or the annual rents or income of the said estates should become vested in or become liable to become vested in any person other than such tenant for life or tenant in tail or encumbering or seeking to encumber said estates my said trustees are to stand possessed of the rents and profits of the

P. O. LAWRENCE J. 1919 MOUNTGARRET, *In re.* MOUNTGARRET *v.* INGILBY.

said estates and to apply such rents and profits in such manner as they in their absolute and uncontrolled discretion may think fit for the benefit of any tenant for life or tenant in tail being holder of the Mountgarret Title or at their sole discretion to pay said rents and profits to the holder of the Mountgarret Peerage for the time being free from anticipation or alienation by him so that said estate or their rents and profits shall not be subject to any debts which he or they may contract." And the testator, after making certain specific and pecuniary bequests, devised and bequeathed all the residue of his real and personal estates to his son Henry Edmund (afterwards the 14th Viscount) and A. E. Whittuck, and appointed them executors of his will.

The testator was the heir male of the body of Sir Richard Butler, who in 1550 was by letters patent of King Edward VI. raised to the dignity of Viscount Mountgarret in the Peerage of Ireland to hold the same dignity to him and the heirs male of his body.

The testator died in August, 1900, and on his death his only son, the said Henry Edmund Butler, became the 14th Viscount Mountgarret. The 14th Viscount was twice married. By his first marriage in 1868 he had issue only one son, namely, the said Edmund Somerset Butler (afterwards the 15th Viscount), and three daughters. By his second marriage in February, 1902, he had issue one child only, namely, the plaintiff, Piers Henry Augustine Butler, who was born in August, 1903.

The 14th Viscount died in October, 1912, and was succeeded by his son, the said Edmund Somerset, as 15th Viscount. He married in 1897 and died without issue in June, 1918, and was succeeded by the plaintiff as 16th Viscount and heir male of the body of the 1st Viscount. The 14th Viscount by his will made in February, 1911, after appointing the defendant Ingilby and two other persons trustees and executors thereof, devised his real estates upon trusts under which the plaintiff took a protected life interest contingently on his attaining the age of 25 years with limitations over.

On the death of the 15th Viscount questions arose as to what interest the plaintiff took in the Irish estates under the

will of the 13th Viscount. The greater part of those estates had in the meantime been sold under the Land Purchase Acts, and the proceeds were represented by investments standing in the names of the present trustees of that will, and were capital moneys within the meaning of the Settled Land Acts, 1882 to 1890. Thereupon the plaintiff, by his next friend, issued a summons to determine whether these investments on the true construction of the will of the 13th Viscount and in the events that had happened fell on the death of the 15th Viscount into the residuary devise contained in the same will. If the answer was in the negative, then the plaintiff claimed a declaration that on the death of the 15th Viscount the trustees of the will of the 13th Viscount held the said investments and the hereditaments to be purchased therewith in trust for the plaintiff in fee simple; alternatively a declaration that the same will should be construed as if on the same event the same investments had been devised upon trust for the heirs male of the body of the 1st Viscount Mountgarret, and accordingly that the same trustees held the same investment and the hereditaments to be purchased therewith in trust for the plaintiff in tail male; alternatively a declaration that on the same event the same defendants as such trustees as aforesaid held the same investments and the hereditaments to be purchased therewith in trust for the plaintiff for life.

Jenkins K.C. and *F. E. Farrer* for the plaintiff. The limitations that follow the life estate given to the 15th Viscount create successive estates in tail male and not mere life estates, and the words "for the respective terms of their respective lives successively" only mean that whoever takes under the limitations can only have the enjoyment of the property for his life and do not cut down the estate of inheritance: *Doe* v. *Stenlake* (1); *Hugo* v. *Williams*. (2) Further, under the gift over "for the holder for the time being of the Mountgarret title," the plaintiff as the present holder of the title takes an estate without words of limitation which by virtue of s. 28 of the Wills Act, 1837, carries the fee simple. But if this

(1) 12 East, 515. (2) L. R. 14 Eq. 224.

P. O. LAWRENCE J. 1919 MOUNTGARRET, *In re.* MOUNTGARRET *v.* INGILBY.

view is incorrect, the words "in the event of such title becoming extinct" indicate the general intent of the testator that the estates should follow the devolution of the Mountgarret title and mean that when there is no heir male of the 1st Viscount, then the estates are to go to the testator's right heirs, and under these limitations the plaintiff takes by purchase an estate in tail male as explained in *Wright* v. *Vernon* (1) and Fearne on Contingent Remainders, 10th ed., vol. 1, pp. 80–82. But if the will creates a succession of life estates in perpetuity which would be void for remoteness, then we contend that, having regard to the gift over and the general intent of the testator, the cy-près doctrine applies and the plaintiff takes an estate in tail male: *Forsbrook* v. *Forsbrook* (2); *Monypenny* v. *Dering* (3); *Parfitt* v. *Hember* (4); *Mortimer* v. *West* (5); *Hampton* v. *Holman*. (6) In all these cases, as in the present case, there was a gift over. *Seaward* v. *Willock* (7) and *In re Richardson* (8) will be cited against us, but in each of them there was no gift over. A life estate under the will of the 13th Viscount is more beneficial for the plaintiff than a life interest under the will of the 14th Viscount.

Ward Coldridge K.C. and *Dighton Pollock* for the present trustees of the will of the 14th Viscount and parties claiming under it. The principles for construing wills are laid down in *Heasman* v. *Pearse* (9), and the general intention of a testator is to be gathered from the whole will irrespective of the rule against perpetuities. Here the testator clearly intended to attach the Irish estates to the Mountgarret title, and with that purpose he devised the estates to trustees, and on that trust he engrafted life estates to his son and grandson, followed by a series of successive life estates to unborn persons in perpetuity which are void. As to the suggested estate tail to the plaintiff, we do not deny that, under a gift to A. and the heirs male of the body of an ancestor, A. may take an estate tail: Challis's Real Property, 3rd ed., p. 298. But here the

(1) (1854) 2 Drew. 439, 450.
(2) (1867) L. R. 3 Ch. 93, 99.
(3) (1847) 16 M. & W. 418, 428; on App. (1852) 2 D. M. & G. 145.
(4) (1867) L. R. 4 Eq. 443.
(5) (1828) 2 Sim. 274.
(6) (1877) 5 Ch. D. 183, 190.
(7) (1804) 5 East, 198.
(8) [1904] 1 Ch. 332, 340, 346.
(9) (1871) L. R. 7 Ch. 275, 282.

gift to the holder for the time being of the title is not a gift of an estate tail to the plaintiff, but the gift of a life estate only to each person who from time to time is the holder of the title, and s. 28 of the Wills Act, 1837, has no application: Jarman on Wills, 6th ed., vol. ii., p. 1806. The protection clause and the restraint on alienation—apart from the question of their validity—support the view that the general intent of the testator is to create a life estate in each successive holder of the title. As to the cy-près doctrine it is a rule of construction. *Humberston* v. *Humberston* (1) is the foundation of the rule, and the best definition of it is in *Monypenny* v. *Dering*. (2) It is dealt with in Jarman on Wills, 6th ed., vol. i., p. 289; Gray on Perpetuities, 3rd ed., § 643; *In re Richardson* (3); and is a rule which is not to be extended: *In re Mortimer* (4); *In re Rising*. (5) To apply it in the present case will extend it beyond any reported case.

Jenkins K.C. in reply referred to Jarman on Wills, 6th ed., vol. ii., p. 1345: *Martelli* v. *Holloway* (6); *Ellicombe* v. *Gompertz*. (7)

Cur. adv. vult.

June 5. P. O. LAWRENCE J. This summons was taken out in order to determine what interest the infant plaintiff has in the capital moneys arising from, and in the unsold portions of, certain lands in Ireland devised by the will of his grandfather, Henry Edmund Butler, 13th Viscount Mountgarret. [His Lordship stated the facts and continued:] The plaintiff claims that on the death of his half-brother, the 15th Viscount, without issue he became owner in fee simple, or alternatively tenant in tail male, of the Irish estates. He further claims that if it should be held that he became neither owner in fee simple nor tenant in tail male he, at all events, became tenant for life. The defendants, on the other hand, contend that all the limitations of the Irish estates after the estate for life limited to the 15th Viscount are void for

(1) (1716) 1 P. Wms. 332.
(2) 2 D. M. & G. 145, 172–3.
(3) [1904] 1 Ch. 332, 345.
(4) [1905] 2 Ch. 502, 512.
(5) [1904] 1 Ch. 533.
(6) (1872) L. R. 5 H. L. 532.
(7) (1837) 3 My. & Cr. 127, 151.

P. O. LAWRENCE J. 1919 MOUNTGARRET, *In re.* MOUNTGARRET *v.* INGILBY.

remoteness, and that the Irish estates on the death of the 15th Viscount passed to the 14th Viscount under the residuary devise contained in the testator's will and, consequently, that the capital moneys arising from (and the unsold portions of) the Irish estates are now vested in the trustees of the 14th Viscount's will upon the trusts declared by that will, under which trusts the plaintiff takes a protected life interest contingently on his attaining 25 years of age. Alternatively, the defendants contend that the utmost estate taken by the plaintiff in the Irish estates under the will of the testator, the 13th Viscount, is an estate for life.

I will first deal with the question of remoteness. This depends upon whether the estates limited to the first and other sons of the 15th Viscount are estates for life or estates in tail male. If they are the former, the plaintiff cannot take any estate or interest under the testator's will, as it is conceded that all remainders after an estate for life to an unborn person are void as infringing the rules against perpetuities. In the first place, I am of opinion that this is not (as has been suggested) a case in which the Court has to determine the effect of two inconsistent devises, namely, a gift of an estate tail followed by a gift of an estate for life. If it were, I should have to consider whether the later gift ought not to prevail over the earlier. In my judgment what I have to determine is the true construction of a single devise. I have come to the conclusion that the true effect of this devise is to create estates in tail male and not merely life estates in the first and other sons successively of the 15th Viscount. I have been much aided in arriving at this conclusion by the cases of *Doe* v. *Stenlake* (1) and *Hugo* v. *Williams* (2), the latter case, in my opinion, being for all practical purposes undistinguishable from the present. I will not repeat the reasons given by the learned judges in those cases, but content myself by saying that in my opinion those reasons are applicable to the devise which I have to construe, and that I adopt them as my own. The result is that in my judgment the gift over in default of issue male of the 15th Viscount is not void for remoteness, and it

(1) 12 East, 515. (2) L. R. 14 Eq. 224.

becomes necessary to construe that gift. It has been strenuously contended on behalf of the defendants that the true effect of the gift is to confer only life estates upon the holders from time to time of the Mountgarret title and consequently that the plaintiff became merely tenant for life of the Irish estates, and that all the remainders after such life estate are void for remoteness. On the other hand, the plaintiff contends, first, that the true effect of the devise is to give him a fee simple estate, as he was the holder of the Mountgarret title at the time when the gift over took effect, and no words of limitation were necesssary, regard being had to s. 28 of the Wills Act. The second and main contention of the plaintiff is that the true effect of the devise is to give the Irish estates to him and the heirs male of the body of the 1st Viscount; he bases this contention on the fact that the Irish estates are devised to him in his character of holder of the Mountgarret title, coupled with the gift over which is to take effect only in the event of the title becoming extinct. The third contention of the plaintiff is that even if life estates only are purported to be given to the successive holders of the title, yet as such life estates are to continue so long as there is male issue of the 1st Viscount in existence, the Court ought to apply the doctrine of cy-près and hold that the estates are limited to the plaintiff and the heirs male of the body of the 1st Viscount. In my judgment the predominant intention of the testator to be gathered from his will is that the Irish estates should devolve with the viscounty which, as before stated, was limited to the heirs male of the body of the 1st Viscount. In order to effectuate this intention the testator, in the first instance, gave successive life estates to his son and grandson, who were his only male issue living at the date when he made his will, and each of whom would, in the natural course of events, become the holder of the title. The testator then, as I have held, gave estates in tail male to the first and other sons successively of his grandson, the effect of which was that the Irish estates would devolve with the title so long as there was male issue of the grandson in existence and so long as no tenant in tail were to execute a disentailing

P. O. LAWRENCE J. 1919 MOUNT-GARRET, *In re.* MOUNT-GARRET *v.* INGILBY.

assurance. So far I do not think that there is any real difficulty, but then follows the gift over on failure of the male issue of the testator's grandson named in his will, which is couched in somewhat vague language and has given rise to the contentions raised before me. The testator when he made his will was not in a position to know who would become the holder of the title on the failure of the male issue of his named grandson; probably he did not anticipate that his son would marry again and have further male issue and thought that on the failure of the male issue of his named grandson the title would go to a collateral branch of the family.

The expression "the holder for the time being of the Mountgarret title" has been the subject of some comment. On the one hand, the plaintiff contended that the expression was intended to denote the particular person who, at the time of the failure of the male issue of the 15th Viscount, happened to be the holder of the title. The defendants, on the other hand, contended that the words "for the time being" ought to be read as synonymous with "from time to time," and that therefore the expression was intended to denote all the successive holders of the title. In my opinion, for the reasons hereafter stated, it is not material to consider which of these contentions is the right one. In my judgment the key to the true construction of this devise is to be found in the gift over which follows it. There are numerous cases in which a gift over has been held to explain, enlarge or cut down a previous gift. A notable example of this class of cases is *Machell* v. *Weeding* (1), in which Shadwell V.-C. states: "Whether an estate be given in fee or for life, or generally, without any particular limit as to its duration, if it be followed by a devise over in case of the devisee dying without issue, the devisee will take an estate tail." In making this statement the learned Vice-Chancellor is of course using the expression "dying without issue" as importing an indefinite failure of issue. In the present case, I am of opinion that the expression "on the title becoming extinct" is equivalent to and means

(1) (1836) 8 Sim. 4, 7.

"on the failure of the heirs male of the body of the 1st Viscount." If that be so, and the gift to the holder for the time being of the title means, in the events which have happened, a gift to the plaintiff, we have in this will a gift to the plaintiff without any particular limit as to the duration of the estate to be taken by him followed by a gift over on the failure of the heirs male of the body of the first viscount. Such a gift, in my opinion, operates as a gift to the plaintiff and the heirs male of the body of the first viscount. The plaintiff, being the heir male of the body of the first viscount by lineal descent, takes an estate in tail male which is descendible or transmissible not only to the heirs male of his body but also (on failure of such issue) to collateral relatives who are heirs male of the body of the first viscount. If, on the other hand, the gift to the holder for the time being of the title ought, on the true construction of the will, to be held to denote a gift to the successive holders from time to time of the title, we have in this will a devise to such successive holders without any particular limit as to the duration of the estates to be taken by them, followed by a gift over on failure of the heirs male of the body of the first viscount. Such a gift, in my opinion, operates as a gift to the heirs male of the body of the 1st Viscount, and under it the plaintiff, as the heir male of the body of the 1st Viscount at the date when the gift takes effect, takes an estate in tail male descendible or transmissible as before explained. Thus, whichever meaning may properly be attributable to the expression "the holder for the time being of the Mountgarret title," the plaintiff takes an estate in tail male descendible or transmissible as before mentioned. That such an estate as I hold to have been conferred on the plaintiff is known to the law, cannot be disputed. It is thus described in Fearne on Contingent Remainders, 10th ed. (1844), vol. i., p. 82: "It is a sort of entail, which, though it first attaches in the special heir according to the nature of the description, yet terminates not in him and his representatives of the species denoted, but continues its progress through the whole race of heirs described; and in the same course as if it had been an estate vested in the ancestor descendible from him to his

P. O. LAWRENCE J. 1919 MOUNT-GARRET, *In re.* MOUNT-GARRET *v.* INGILBY.

heirs of that description." In Challis's Real Property, 3rd ed., p. 298, I find it stated: "It plainly appears from Litt. s. 30 and Lord Coke's comment that a limitation to A. and the heirs of the body of any ancestor whose heir by lineal descent he is, vests an estate tail in A., which is descendible, or rather transmissible, not only to his issue, but (on failure of his issue) to collateral relatives who are heirs of the body of the specified ancestor." It was contended on behalf of the defendants that the declaration in the testator's will which follows the devise of the Irish estates tends to show that the testator intended only life estates to be taken by the successive holders of the title. In my opinion this contention is not borne out by the language of the declaration, which I think is consistent with the view which I have taken that the testator conferred estates for life on his son and grandson only and estates in tail male on all the other takers. By the declaration the testator no doubt attempted to provide that the Irish estates and the title should permanently devolve together by prohibiting the owners for the time being (whether tenant for life or tenant in tail) from alienating, charging or encumbering the estates. But in my judgment the futile attempt to prevent the tenants in tail from barring the entail does not warrant the Court in holding that the testator intended to create merely life estates in the successive holders of the title.

I propose to say very little on the doctrine of cy-près. In the view which I have taken of the true construction of the devise there is no room for the application of this doctrine. The doctrine of cy-près would only have to be considered if the testator had given life estates to the successive holders of the title. I agree with Mr. Coldridge's contention that the doctrine is one which ought not to be extended, but I am not prepared to express an opinion whether it could properly be said to be an extension of the doctrine if (on the assumption that successive life estates had been given) it were applied to such a case as the present, merely because the estate tail which under the doctrine would have been held to have been conferred upon the 16th Viscount would not have been an

ordinary estate in tail male, but an estate of the nature I have described.

In the result I hold that on the true construction of the devise in question the capital moneys arising from, and the unsold portions of, the Irish estates are now vested in the plaintiff as tenant in tail male, and I make a declaration accordingly.

Solicitors for all parties : *Evans, Wadham & Co.*

H. L. F.

In re WALLACE.
CHAMPION *v.* WALLACE.

[1918 W. 846.]

Will—Condition Precedent—Bequest to Legatee on Acquisition of Baronetcy—Public Policy—Alternative independent Gift to Treasury.

Testator by clauses 17 and 18 of his will directed, in the events which happened, that the capital of his residuary estate, on the determination of certain prior trusts affecting the income thereof, should go to and vest in the testator's sole surviving son if he should have acquired the title of baronet or other title superior thereto ; but if he should not have acquired the title of baronet or other title superior thereto the testator directed that the residue was to be divided in equal moieties between the British Treasury and the Treasury of British India :—

Held, that the contingent gift to the son was not void as being contrary to public policy, but was capable of taking effect on the fulfilment of the condition.

It is not the law that all conditions dependent on the acquisition of a dignity are contrary to public policy.

Egerton v. *Earl Brownlow* (1853) 4 H. L. C. 1 distinguished.

ADJOURNED SUMMONS.

Charles William Wallace, the testator, died on August 2, 1916, having by his will dated January 20, 1912, appointed executors and trustees to whom he devised and bequeathed his residuary real and personal estate upon trusts for sale and conversion and investment, with power to postpone the same in their

EVE J.
1919
WALLACE, *In re.* CHAMPION *v.* WALLACE.

discretion, and, subject to the payment of a certain annuity, directed the annual income of his residuary estate to be divided equally between such of his five children—Charles William Wallace, Robert Wallace and three daughters—as should be living at the dates on which such income was realized, with a provision in favour of his grandchildren in case any child of the testator should die leaving children. By clause 16 the testator directed that when all claims upon the income of his residuary estate under the provisions thereinbefore contained should have ceased and the capital should have become divisible under the provisions thereinafter contained, an account should be taken by the trustees of the capital as therein mentioned.

Clause 17 was as follows: "Subject to the provisions of the last-mentioned clause and to any outstanding claims on the income of my residuary estate I direct that the capital of my residuary estate shall go to and vest in either or both of my said sons who shall have acquired the title of baronet or other title superior thereto, or as such sons or son acquiring such title or titles respectively shall by deed or will appoint, and upon either of my sons acquiring such a title I direct that after such provision shall have been made as my trustees consider necessary for the protection of the rights of any of my other children or of any grandchildren of mine under the provisions hereinbefore contained in the income of my said residuary estate, my trustees shall transfer and make over to my said son a moiety of the capital of my said residuary estate, and shall upon my other son acquiring the title of baronet or other title superior thereto in like manner transfer and make over to such other son the remaining moiety of the said capital, and shall also transfer and make over to my said sons in equal moieties such of the investments forming part of my residuary estate as may have been retained for the protection of the rights of any of my children in the income on the death of any child or children for whose protection they may have been retained; but if only one of my said sons shall acquire the title of baronet or other title superior thereto as aforesaid, I direct that my trustees shall on all

claims of my said children, other than such last mentioned son himself, to any portion of the income of my said residuary estate being satisfied, transfer and make over to such last-mentioned son or his appointees the balance of the investments constituting the same."

Clause 18: "If neither of my said sons shall acquire the title of baronet or other title superior thereto, then upon the death of the last surviving child of mine or any grandchild entitled to any portion of the income of my said residuary estate, I direct that my trustees shall, subject to the provisions of clause 16, divide transfer and pay the capital moneys representing my residuary estate in equal moieties or the investments representing the same to and between the Britishr Treasury and the Treasury of British India. I do this because I hold the view that, subject to the possessor's right during his life to the enjoyment thereof and to the making of adequate provision for his children until they are old enough to provide for themselves, all possessions great or small being acquired from or through the people as mine were should return to the people. I am not acting fully up to this view in the case of my children because the law wrongfully I think does not enforce it on all others and their children."

Robert Wallace died in the testator's lifetime without issue and without having acquired a baronetcy or superior title, and by a codicil to his will the testator directed his will to be read as if the name of Robert Wallace did not appear therein. The surviving son Charles William Wallace had not hitherto acquired a baronetcy or superior title.

This was an originating summons taken out by the trustees of the will against Charles William Wallace and the three daughters of the testator and the Attorney-General and Secretary of State for India as defendants, for the determination of (inter alia) the questions, (1.) whether the gift of the residuary estate to the defendant Charles William Wallace, conditional on his acquiring the title of baronet or other title superior thereto, was void as offending against public policy or otherwise; and (2.) whether (if the preceding question was

EVE J.
1919
WALLACE, *In re.* CHAMPION *v.* WALLACE.

answered in the affirmative) the gift over of the said residuary estate, in the event of the said defendant not acquiring such title, failed, and whether the said residuary estate was undisposed of.

Sheldon for the trustees.

Luxmoore K.C. for Charles William Wallace and the three daughters of the testator. The gift in clause 17 is void as offending against public policy, and, if so, the gift over in clause 18 is affected by the same vice, with the result that the attempted disposition of the capital of the residuary estate fails and the capital is undisposed of. It is to the interest of the son himself to support this view. The gift is bad as offending against public policy on two grounds—(1.) as tending to embarrass the Crown in the distribution of honours, and (2.) as possibly inducing the subject to avail himself of improper means to obtain the dignity. The case is governed by *Egerton* v. *Earl Brownlow.* (1) There were two points involved in that case, first, whether the conditional limitation was precedent or subsequent, and secondly, whether it was void on grounds of public policy, and the House of Lords held that it was subsequent and void. The only distinction between that case and the present is that here the bequest in clause 17 depends on a condition precedent, but the principles laid down in the House of Lords are as applicable to the one case as to the other. As to clause 18, the Treasuries are intended to take in one event only, and if that involves an illegal condition there is no alternative independent gift over to the Treasuries, such as there was in *In re Davey.* (2)

Austen-Cartmell for the Attorney-General and the Secretary of State for India. Clause 18 of the will under which I claim will take effect according to its tenor. It is an alternative and independent gift to take effect in any event in case the son fails to acquire the dignity: *In re Davey.* (2) I submit, moreover, though it is immaterial to my argument under clause 18, that there is nothing contrary to public policy in

(1) 4 H. L. C. 1; as to the exact nature of the dispositions in question see per Lord St. Leonards at p. 208.
(2) [1915] 1 Ch. 837.

clause 17. It is carrying the decision of the House of Lords in *Egerton* v. *Earl Brownlow* (1) too far to apply it to the circumstances of this case. The decision of the House of Lords was that a vested estate cannot be cut down by a subsequent illegal proviso. [He referred to the speeches of Lord Lyndhurst (2), Lord Brougham (3), Lord Truro (4), Lord St. Leonards (5), and Lord Cranworth L.C. (6)] The ratio decidendi of that case was that the proviso was in the nature of a condition subsequent, and there is nothing in the decision or the speeches of the learned law lords to show that in the case of a condition precedent the gift or limitation is rendered void because it may—as distinguished from must—lead to something illegal. There are many common conditions the fulfilment of which might be brought about by improper or illegal means, but that possibility does not render such conditions obnoxious to the public weal. In the present case the gift is calculated to encourage a laudable ambition in the legatee to devote himself to the public service and tends to the advantage and not to the detriment of the public. The notion that the Crown may be influenced in the distribution of honours by such a condition is dealt with by Cresswell J. in giving his opinion in *Egerton* v. *Earl Brownlow* (7), where he said, "I will not for a moment admit the indecent supposition that the Sovereign in doing that act"—conferring a title and dignity—"can be influenced by any but pure and constitutional considerations; nor can I suppose, much less assume as a fact, that the advisers of the Crown will, in that capacity, be actuated by corrupt considerations rather than by those of a pure and honourable character." To sum up, I submit first, that the gift in clause 17 cannot be treated as subversive of morality or public policy; and secondly, that, whether it is void on this ground or not, the alternative gift in clause 18 will take effect by whatever cause the gift in

(1) 4 H. L. C. 1.
(2) Ibid. 157, 160.
(3) Ibid. 165.
(4) 4 H. L. C. 183, 189.
(5) Ibid. 207, 211, 229.
(6) Ibid. 251.
(7) 4 H. L. C. 85.

EVE J.
1919
WALLACE, *In re.* CHAMPION *v.* WALLACE.

clause 17 happens to fail:—*Hall* v. *Warren* (1), where on the failure of a devise to a charity on the ground of mortmain a gift over was held to take effect.

Luxmoore K.C. in reply.

Cur. adv. vult.

July 16. EVE J. delivered the following written judgment: The questions upon which judgment was reserved are those raised in paras. 1 and 2 of the reamended summons, and their solution involves the ultimate destination of the testator's residuary estate which is of considerable value.

By clauses 17 and 18 of the will and in the event which has happened of the testator's younger son having died without having acquired the title of baronet or other title superior thereto, the capital of the residuary estate, subject to certain prior trusts affecting the same and the income thereof, with which it is unnecessary to deal in detail, is, upon the determination of such prior trusts, to go to and vest in the testator's sole surviving son if he shall have acquired the title of baronet or other title superior thereto, but if he shall not have acquired the title of baronet or other title superior thereto, the testator directs that the residue is to be divided in equal moieties between the British Treasury and the Treasury of British India.

No question of construction properly so called arises upon the clauses referred to; they contain alternative conditional bequests, the condition being a condition precedent. If it is fulfilled the gift under clause 17 takes effect, if it is not fulfilled the residue passes under clause 18. It is, in my opinion, inaccurate to speak of the gift in clause 18 as a gift over—it is an alternative independent gift.

It is argued, however, that the condition is void as being contrary to public policy. I confess that I have the greatest difficulty in appreciating how it can be seriously contended that this condition militates against the public good or is inimical to the public welfare. In *In re Beard* (2) the present Master of the Rolls, then a judge of first instance, in the course

(1) (1861) 9 H. L. C. 420. (2) [1908] 1 Ch. 383, 386.

of his judgment, deciding that a condition subsequent whereby the interest of a devisee of real estate was to be divested if he entered into the naval or military services of the country was void as opposed to the public good, observed : " When questions arise as to conditions or provisions being void as being against the public good or against public policy, great caution is necessary in considering them ; at different times very different views have been entertained as to what is injurious to the public. . . . . If, however, it be clearly established that the condition is against public policy, it is certainly void." Can I possibly hold it to be clearly established that a provision not tending to prevent the legatee from obeying a call to public duty but on the contrary calculated to instigate him to devote his abilities and time to public service and for the benefit of the community is against public policy ?

It is urged that I ought so to do because he may be tempted to try by sordid and dishonourable means to acquire the qualifying title, and others may be induced to exercise their influence to obtain it for him by considerations more intimately connected with his fortune than with his intrinsic merits. That such possibilities exist I am not concerned to deny, but, as was forcibly pointed out in the course of the argument on behalf of the Crown, there are many quite common and wholly unassailable conditions the fulfilment of which might be brought about by acts not only contrary to public policy but vicious and even criminal ; yet no one would suggest that all these conditions are thereby rendered obnoxious to the public weal. In my opinion, in determining whether the condition is or is not void as being opposed to the public good, the Court ought to ascertain whether its fulfilment necessarily involves any act or conduct contra bonos mores or against the welfare of the State ; if it does not, it is valid even though its fulfilment is capable of being brought about by acts and conduct opposed to the public welfare. Assuming, as I am bound to assume, that baronetcies and higher honours are in the majority of cases conferred upon individuals as rewards for meritorious service to the community, it follows not only

EVE J.
1919
WALLACE, *In re.*
CHAMPION *v.* WALLACE.

that the condition is not tainted with any inherent mischief but that it is more capable of being fulfilled by conduct beneficial to the State than by methods subversive of every canon of personal and public self-respect. The possibility of such methods being successfully employed is no doubt deplorable, but it cannot, in my opinion, operate to vitiate a condition in the fulfilment of which advantages to the State are far more likely to predominate, and I cannot therefore hold this condition to be void.

It has been pressed upon me that this conclusion is not in accord with the decision of the House of Lords in *Egerton* v. *Earl Brownlow*. (1) I do not agree. The proviso with which the House had there to deal was a declaration that the use or estate limited by the earlier part of the testator's will should in a certain event cease and be absolutely void. As was pointed out in many of the speeches, and in particular by Lord Lyndhurst (2), these words even in their ordinary acceptation and without reference to any technical rule denote exclusively a condition subsequent, and he adds: "The proviso has nothing of the character of a condition precedent. It is not said that upon the occurrence of such an event a use or estate shall arise, but that if such an event shall not have occurred, a use or estate previously limited shall be defeated. It does not create—it determines and destroys."

I have therefore in the first place a wholly different class of condition to deal with, a condition upon the fulfilment of which an interest arises, not one the non-performance of which operates as a defeasance of an interest already created, and although this alone would not justify the Court in upholding as valid a condition held by the House to be at variance with public policy—inasmuch as that question cannot be said to depend on the technicalities involved in the inquiry whether a condition is precedent or subsequent—it cannot by any means be disregarded in forming an opinion whether the House intended to lay down as a general proposition that all conditions dependent on the acquisition of a dignity are contrary to public policy on the ground—to use Lord

(1) 4 H. L. C. 1. (2) 4 H. L. C. 157.

Brougham's language (1)—that they tend "to encourage attempts upon the virtue of one class of public servants" and "to lay snares for the integrity of another class."

I do not think the House did so intend. I prefer to believe that the question was not thereby finally concluded, and that Lord Lyndhurst, when in delivering the leading judgment he said (2): "What cases come within the rule must be decided as they successively occur. Each case must be determined according to its own circumstances. . . . . Whether the particular case comes within the rule, it is the province of the Court in each instance, acting with due caution, to determine," deliberately left it open to me to decide this case as I have done.

The first question raised by the summons I accordingly answer in the negative, which renders it unnecessary to deal with the second question.

Solicitors for the plaintiffs and the four children of the testator: *Sanderson, Adkin, Lee & Eddis.*

Solicitor for the other defendants: *The Treasury Solicitor.*

(1) 4 H. L. C. 172. (2) 4 H. L. C. 160, 161.

A. C.

SARGANT J.

1918

Oct. 22, 23, 24, 25.

IVES *v.* BROWN.

[1917 I. 964.]

Vendor and Purchaser—Residential Building Estate—Restrictive Covenants—Assignment of Benefit by Operation of Law—Right of Executors of Covenantee to sue.

About 1870 a considerable building property called "The Branksome Estate," belonging to G. D. in fee simple, was in course of development on building agreements entitling the builders to leases, with an option of purchasing the fee simple, and in 1876 S. B. held one of the leases and options in respect of land and a workshop called 14, Wharf Road. G. D. died in 1882, having devised the Branksome Estate to E. D. and F. F., their heirs and assignees, on trust to pay the rents to E. D. for life, and after her death to stand seised upon trust for such persons as she should by will appoint, and in default of appointment in trust for her right heirs. Soon after G. D.'s death S. B. exercised his option, and E. D. and F. F. conveyed 14, Wharf Road, to him in fee, subject to restrictive covenants (therein contained) by him with E. D. and F. F., their heirs and assigns, to the intent that the covenants might for ever thereafter run with the hereditaments thereby granted, that S. B. and all persons deriving title under him would not, without the written consent of E. D. and F. F., their heirs or assigns, or the persons deriving title under them or either of them (inter alia), (1.) carry on or permit to be carried on on the premises conveyed any trade or business except that of a builder or coal merchant; and (2.) would not do or permit on the premises any act, matter or thing whatsoever which might be a nuisance, annoyance or disturbance to E. D. and F. F., or the persons deriving title under them or either of them. F. F. died in 1885. E. D. died in 1917, having by her will exercised her power of appointment so as to make R. I. tenant for life of the portion of the Branksome Estate of which 14, Wharf Road, was part, and given him one-half of her residuary personalty. R. I. and F. R. E. were appointed her executors. S. B. died in 1883, having by his will vested in the trustees thereof 14, Wharf Road, which they let for a term of years to X. to be used, and which were used, for a business which was not permitted by covenant (1.). X. in the course of this business committed breaches of covenant (2.) as regarded annoyance and disturbance. R. I., as tenant for life of adjoining freehold lands also forming part of the Branksome Estate, sued S. B.'s trustees and X. for an injunction to restrain the breaches of covenant. At the trial F. R. E., the other executor of E. D., was joined as co-plaintiff, he and R. I. being the legal personal representatives of the survivor of the original covenantees:—

Held, (1.) distinguishing *Rogers* v. *Hosegood* [1900] 2 Ch. 388, and applying the test laid down in *Renals* v. *Cowlishaw* (1878) 9 Ch. D. 125; 11 Ch. D. 866, that there was not enough in the words or contract of the conveyance to S. B. to annex the benefits of the covenants to the

whole of the Branksome Estate then remaining in the hands of the covenantees or to any particular parts thereof; (2.) that the dispositions of E. D.'s will did not amount to an assignment to her devisees of the benefit of the covenants; but (3.) that the benefit could pass by operation of law as well as by express assignment, and that the covenants could be enforced by R. I. and F. R. E. as representing together both her real estate and personal estate.

Formby v. *Barker* [1903] 2 Ch. 539 distinguished.

THIS action was brought to enforce restrictive covenants contained in a conveyance of land and buildings known as 14, Wharf Road, Bournemouth, The land formed part of a considerable building estate called "The Branksome Estate," situate at the western end of the town of Bournemouth and formerly belonging in fee-simple or its equivalent to George Durrant. Some forty to fifty years ago this estate was in course of being developed on building agreements entitling the builders to leases for ninety-nine years with an option of purchasing the fee-simple; and in this particular case such a lease, dated September 26, 1876, had been granted by George Durrant to Sidney Brown of a piece of land, with the workshops, stables, and buildings, forming part of the Branksome Estate and known as 14, Wharf Road, at the rent and subject to the covenants by the lessee and conditions therein contained, with the option for Sidney Brown to purchase the reversion and inheritance upon the terms therein mentioned.

On November 21, 1882, George Durrant died, having by his will, made in 1877, devised the Branksome Estate to his niece, Elizabeth Durrant, and Frederick Fox, their heirs and assigns, upon trust to pay the net rents thereof to Elizabeth Durrant during her life, and after her decease to stand seised thereof upon trust for such persons and generally in such manner as Elizabeth Durrant should by will appoint, and in default of such appointment in trust for her right heirs for ever.

Soon after George Durrant's death, Sidney Brown exercised the option of purchase contained in his lease; and by an indenture of conveyance dated April 14, 1883, Elizabeth Durrant and Frederick Fox, in exercise of the power conferred upon them by the will of George Durrant, conveyed 14, Wharf Road, to the use of Sidney Brown in fee-simple, subject to

SARGANT J. 1918 IVES v. BROWN.

the term created by the lease of 1876 (which, however, as the learned judge pointed out, must have been merged in the inheritance), and subject to the restrictive and prohibitive covenants thereinafter contained.

Sidney Brown thereinafter covenanted with Elizabeth Durrant and Frederick Fox, their heirs and assigns, to the intent that the same covenants might for ever thereafter run with the lands, hereditaments and premises thereby granted, that he Sidney Brown and all persons deriving title under him would not, without the consent in writing of Elizabeth Durrant and Frederick Fox, their heirs or assigns or the persons deriving title under them or either of them, make any alteration in the plan or elevation of the workshops and buildings, or erect any other messuage or building, wall or fence upon the piece of ground thereby conveyed, except such buildings (not to be used as dwellings) as might be necessary for a builder's or coal merchant's yard, or exercise, or carry on or permit to be exercised or carried on, in or upon the said workshops and premises thereby conveyed or any part thereof, any trade or business whatsoever except that of a builder or coal merchant; and would not do or permit or suffer to be done in or upon the piece of ground any act, matter, or thing whatsoever which might be a nuisance, annoyance or disturbance to Elizabeth Durrant and Frederick Fox, or the persons deriving title under them or either of them, or their tenants, or the neighbourhood.

Wharf Road, on which the land conveyed fronted, was a road lying immediately to the north of Bournemouth West Station and the railway running from that station in a westerly direction towards Poole. On the south side of the road on which the land in question lay the buildings were almost entirely buildings for business purposes, and the covenants in the leases or conveyances of all the sites of those buildings were substantially similar to those in the conveyance of No. 14, Wharf Road. But the north side of Wharf Road was occupied by the gardens of private residences which fronted on and were numbered in a purely residential road called Surrey Road, lying to the north of and running parallel with Wharf

Road. Surrey Road was a thoroughfare, and of late years there had been a service of public vehicles along it. Wharf Road, on the other hand, was not a thoroughfare for vehicles, the roadway being closed at the west end, though there was a through passage there for foot passengers. The leases and conveyances of the sites fronting Surrey Road and backing on Wharf Road contained covenants which provided that the houses thereon should only be occupied as private residences, but otherwise were similar to the covenants in the assurances of the houses fronting on Wharf Road.

Elizabeth Durrant survived F. Fox (who died in 1885), and died on January 4, 1917, having by her will exercised the power of appointment conferred by the will of G. Durrant, and devised the Branksome Estate (except certain Branksome Estate Gardens and other like property which were specially vested in trustees upon trusts for the benefit of residents) to uses under which Robert Ives, the original plaintiff in this action, was at the time of such action the tenant for life. Under certain other provisions of her will Robert Ives was also entitled to one-half of her residuary personal estate. Her legal personal representatives and trustees at the time of the trial were Robert Ives and F. R. Eaton, who by a codicil was appointed an additional executor and trustee.

At the time when the action was commenced and tried the Branksome Estate, of which the plaintiff, Robert Ives, was tenant for life, though still a considerable estate, comprised a much smaller area than the estate as owned by the late George Durrant. The evidence of the agent of the estate was that almost the whole of it had now been developed, and that, as regarded some two-thirds of the sites taken on building leases, the lessees' options to purchase had been exercised. The portions of the estate that still remained subject to building leases did not form any one continuous area, but were scattered irregularly amongst the sites that had been purchased and conveyed away. It appeared, however, from a coloured map that was produced and verified by the agent of the estate, that of the sites on the south of Wharf Road about one-half of those to the east of No. 14, and the whole of those to the

SARGANT J. 1918 IVES v. BROWN.

west of No. 14, still remained subject to the original building leases and formed part of the Branksome Estate; and that this was also the case with about one-half of the sites fronting on Surrey Road and backing on the north of Wharf Road, and particularly with three of these sites which lay more immediately opposite 14, Wharf Road.

Sidney Brown, the grantee under the conveyance of April 14, 1883, died in the month of July, 1898. Under his will No. 14, Wharf Road, became vested in the defendants, Clara Brown, Sidney George Brown and Charles Edwin Brown, as the trustees thereof (below called "the defendant trustees"). In the summer of 1915 the defendant trustees agreed to let a considerable portion of No. 14, Wharf Road, to the defendants Elliott Brothers for a term of five years from Christmas, 1915, for the express purpose of being used for the business of motor char-à-banc and motor taxicab proprietors. Certain alterations were made in the premises by the lessors to adapt them for the purposes of that business; and the defendants Elliott Brothers in due course entered into occupation of the property let to them, and afterwards carried on the business in question.

After a time complaints were made by the occupiers of houses in Surrey Road of annoyance caused to them by the carrying on of this business, and the agent of the Branksome Estate was appealed to. In the result the plaintiff Robert Ives, as the freeholder of the unsold portions of the estate, began this action against the defendant trustees and the defendants Elliott Brothers, asking for a declaration that the defendants were not, nor were any of them, entitled to use or permit to be used No. 14, Wharf Road, for the purpose of a motor garage, or for the purpose of carrying on the business of motor car proprietors and letting out motor vehicles for hire, and claiming an injunction and damages accordingly.

The defendants set up several defences. It could not be denied that there had been a breach of the covenant restricting the business for which 14, Wharf Road, could be used. But both sets of defendants denied that any annoyance or disturbance had been caused in breach of the covenant in that respect; and the defendant trustees also objected that, if

such an annoyance or disturbance were caused, it was not necessarily incident to the business in question, and that they were not liable for any breach of this covenant by the defendants.

A second defence was that the acts and omissions of the owners of the estate with regard to the relaxation and non-enforcement of similar covenants on neighbouring sites were such as to render it inequitable for the plaintiff to enforce these covenants in the case of 14, Wharf Road. But it was not shown that there had been any clear breach of any of the covenants in respect of the adjoining sites which had been brought to the notice of the owners of the estate or of their agents, and which had been neglected by them, with the possible exception of a very recent and trifling breach consisting in one of the sites in Wharf Road being used for the purposes of a mineral water-bottle exchange. Moreover, as regarded such relaxation as was proved, his Lordship pointed out that the power to relax was expressly provided for in the common form of covenant, and said that there was nothing to indicate that it was not carefully and judiciously exercised.

A third defence was that there had been such an alteration in the character of the neighbourhood since the year 1883 that the Court would no longer enforce covenants the object and purpose of which had disappeared. But this defence was withdrawn by the defendants' counsel at the close of their case.

The serious legal defence set up was that the restrictive covenants were not imposed for the benefit of the plaintiff Robert Ives or his predecessors, or of the Branksome Estate, or any defined or undefined part thereof, but were personal or collateral only, and were not enforceable by that plaintiff.

During the trial the writ and statement of claim were allowed to be amended by adding as co-plaintiff Frederick Ray Eaton, who was, with the plaintiff Robert Ives, the legal personal representative of Elizabeth Durrant, the survivor of the two original covenantees.

Romer K.C. and *Leeke* for the plaintiffs. The expression "heirs and assigns" in the covenant with Elizabeth Durrant

SARGANT J. 1918 IVES v. BROWN.

and Frederick Fox means the owners of the Branksome Estate in the popular sense referred to by Romer L.J. in *Everett* v. *Remington*. (1) Either the benefit of the covenant was annexed to and became inherent in the land retained by the vendor, as in *Rogers* v. *Hosegood* (2), or, if the covenant was a personal one, the benefit of the covenant passed under the devise of the retained land to the plaintiff Ives in Elizabeth Durrant's will.

Rolt K.C. and *H. S. Preston* for the defendants, the trustees of Brown's will. The plaintiffs cannot sustain the action. Certainly Robert Ives cannot succeed in an action on the restrictive covenant. The benefit of the covenant was not annexed to the part of the estate retained by George Durrant and his trustees, and it did not pass to Robert Ives under the devise to him in Elizabeth Durrant's will, as something inherent in and part of the subject-matter of the purchase, for there are no such clear words here as there were in *Rogers* v. *Hosegood* (2), annexing the benefit of the covenant to the retained part of the estate. Nor is any intention sufficiently shown that the benefit of the covenant should run with the retained part of the estate: *Keates* v. *Lyon* (3); *Renals* v. *Cowlishaw*. (4) The covenant was a merely personal one, not to benefit the estate but the covenantees, so as to enable them to deal more advantageously with the retained portion of the Branksome Estate. In *Formby* v. *Barker* (5) Stirling L.J. considered that the executors held the benefit of the covenant for the personal estate.

S. H. Emanuel for the defendants Elliott Brothers.

Romer K.C. in reply. *Formby* v. *Barker* (5) assists the case of the plaintiffs, who now include the legal personal representatives of Elizabeth Durrant.

Cur. adv. vult.

1918. Oct. 25. Sargant J., after stating the facts above stated and the issues raised, and disposing of the second and third defences, and stating, as above, that it could not be

(1) [1892] 3 Ch. 148.
(2) [1900] 2 Ch. 388.
(3) (1869) L. R. 4 Ch. 218.
(4) 9 Ch. D. 125; 11 Ch. D. 866.
(5) [1903] 2 Ch. 539.

denied that there had been a breach of covenant in respect of the business for which 14, Wharf Road, could be used, continued as follows: I am completely satisfied by the evidence that, while there was nothing in the conduct of the defendants Elliott Brothers' business to amount to a common law nuisance, there was quite enough to constitute an "annoyance or disturbance," within the meaning of the covenant in question, to the adjoining lessees and grantees from the owners of the Branksome Estate and to the neighbourhood.

Such covenants are, of course, framed for the very purpose of securing a much more adequate protection than that given by the ordinary law of nuisance; and, while I recognize that they must not be used to indulge fanciful or capricious objections or apprehensions, I am satisfied that in this case there was an annoyance or disturbance going far beyond this and of a definite practical character. In respect of this annoyance, however, I do not think that the defendant trustees are liable, since, in my judgment, it arose from the way in which the business was actually carried on by Elliott Brothers and was not necessarily incident to any motor business whatever that might have been carried on at No. 14, Wharf Road.

This brings me to the only really serious legal defence to this action—namely, that the benefit of the covenants and the right to sue thereon had not passed to the plaintiff Robert Ives. As the pleadings stood at the beginning of the hearing, the plaintiff was apparently suing merely as the devisee of the Branksome Estate or such part thereof as had not been conveyed away. But it appeared at an early stage of the hearing that not only had Elizabeth Durrant been the equitable owner of the Branksome Estate in the month of April, 1883, but that she was afterwards the survivor of the joint covenantees in that indenture, and that the plaintiff Robert Ives, besides being entitled to half her residuary personalty, was one of her two surviving legal personal representatives, the other being Frederick Ray Eaton. Accordingly, while reserving all questions of costs, I allowed the writ and statement of claim to be amended by adding Mr. Eaton as a co-plaintiff, and introducing allegations to show the position of the two

SARGANT J. 1918 IVES v. BROWN.

co-plaintiffs as legal personal representatives of the survivor of the two original covenantees. In this state of the record the plaintiffs have together two alternative causes of action. If the benefit of the covenant ran with the land, of which the original plaintiff is now the tenant for life, he is entitled to succeed on that ground. If, on the other hand, the covenant was of a mere personal character, the two plaintiffs may succeed as assigns by operation of law of the original covenantee.

As regards both these alternative causes of action, and particularly as regards the first of them, the leading authority is, of course, *Renals* v. *Cowlishaw* (1); and, although a number of other cases were cited to me which I have carefully considered, I think that it is in that case that the root of the matter is to be found. Now applying the test laid down in *Renals* v. *Cowlishaw* (1), I cannot find that there is enough here, in the conveyance of April 14, 1883, to annex the benefits of the covenants in question to the whole of the Branksome Estate then remaining in the hands of the covenantees or to any particular portions thereof. Certainly there are no such definite words as were to be found in *Rogers* v. *Hosegood* (2), and I cannot find sufficient context in the other parts of the conveyance to serve the purpose. No doubt one can see plainly that the covenants were inserted because the covenantees were owners of adjoining property and with a view to benefiting them accordingly. But this was really equally obvious in *Renals* v. *Cowlishaw* (1), and I cannot see that there is any greater reason in this case than in that for ascribing an intention to benefit the retained property and the owners thereof from time to time by virtue merely of their ownership. Further, I notice that in *Everett* v. *Remington* (3), which was concerned with the enforcement of similar covenants on this very estate, Romer J. declined to hold that the benefit of them ran with the whole of the land retained by the vendors. And the fact that he decided that, for the purpose of ascertaining who were the persons entitled to permit relaxations of the covenants under the terms thereof, the words " heirs

(1) 9 Ch. D. 125; 11 Ch. D. 866. (2) [1900] 2 Ch. 388.
(3) [1892] 3 Ch. 148.

and assigns " were to be construed as meaning the persons who were the owners of the Branksome Estate as popularly or ordinarily so called, is far from being a decision that the benefit of the covenants ran with the Branksome Estate in that sense. The case of *Rogers* v. *Hosegood* (1) is, of course, entirely distinguishable from the present, since there the benefit of the covenants was in terms annexed to lands which were the subject of a sufficient though somewhat general description. On the other hand, *Renals* v. *Cowlishaw* (2) clearly recognizes that, where a vendor takes a restrictive covenant from a purchaser in order to enable the vendor to deal more advantageously with his other property, the benefit of such a covenant may be expressly assigned together with the whole or part of such other property. Indeed, it is precisely by being able to assign such a covenant that the vendor secures the advantageous realization of such other property. And, if such a covenant can be expressly assigned, it follows a fortiori that it can pass by assignment by operation of law. Here undoubtedly Miss Elizabeth Durrant, as beneficial owner of a large part of the retained property and survivor of the joint covenantees, was entitled at the time of her death to restrain a breach of these restrictive covenants. And it cannot be that on her death this very beneficial right necessarily disappeared and could not be exercised in future by those representing together her real estate and her personal estate. In *Formby* v. *Barker* (3) the only reason why the legal personal representative of the original covenantee was debarred from suing was because no land at all had been retained on the occasion of the sale; and it appears to have been assumed throughout (notwithstanding an ambiguous passage in the very short judgment of Romer L. J.) that the plaintiff would have succeeded had any land been retained in connection with which the covenant had been entered into. Certainly there is nothing in the case to cast doubt on the clear recognition of the doctrine of *Renals* v. *Cowlishaw* (2), that an

(1) [1900] 2 Ch. 388. (2) 9 Ch. D. 125; 11 Ch. D. 866.
(3) [1903] 2 Ch. 539.

SARGANT J. 1918 IVES v. BROWN.

assign of land in connection with which restrictive covenants are given, can, if also an assign of the benefit of the covenants, sue successfully to enforce the covenants, though the benefit of them may not be so definitely attached to the land as to pass by a mere conveyance of it.

I cannot, however, regard the disposition of Elizabeth Durrant's will as amounting to an assignment to her devisees of the benefit of the restrictive covenants in question; and it was, therefore, necessary in my judgment that her legal personal representatives should be joined in the action.

In the result I grant an injunction against both sets of defendants as regards the breach of the first covenant, and against Elliott Brothers as to the breach of the second covenant. As regards the question of costs, I have felt a good deal of difficulty. The amendment allowed at an early stage of the trial was of some importance as introducing a new plaintiff. On the other hand, it was mainly a technical amendment, since the original plaintiff was one of the executors of the surviving covenantee and entitled to half the residuary personalty, besides being the tenant for life of the real estate. Further, as to all questions of fact on which the action was fought out, and which occasioned the main expense, the defendants have failed. On the whole I think justice will be done by ordering the defendants to pay the plaintiffs two-thirds of the costs of the action other than and besides the costs of and occasioned by the amendment, which must be borne by the plaintiffs, with a set off. I see no sufficient reason, though I have considered the point carefully, for distinguishing between the defendants as regards the costs they have to pay.

Solicitors: *Trotter & Patteson, for Overbury, Steward & Eaton, Norwich; Ravenscroft, Woodward & Co.; R. H. Bentley, for Tattersall & Son, Bournemouth.*

F. E.

MORRISON *v.* BARKING CHEMICALS COMPANY, LIMITED.

SARGANT J.

1918

Dec. 18, 20.

[1918 M. 1415.]

Principal and Surety—Surety's Right to Payment by Principal—Notice by surety to determine guaranteed unascertained Liability.

By an instrument of guarantee given to a bank M. guaranteed payment on demand, or on the sooner determination of the guarantee, of all moneys due or to be due to the bank by the B. Co. on current or other account, the guarantee to be a continuing one up to 5000*l.* only for principal, and to be determinable on the initiation of the bank by closing the account, ascertaining the amount due and demanding payment by M., or by M. giving the bank three months' notice to determine the guarantee. In the absence of both these steps:—

Held, that M. had no immediate right to compel the B. Co. to relieve him from his liability.

Ascherson v. *Tredegar Dry Dock & Wharf Co.* [1909] 2 Ch. 401 distinguished.

On or about August 22, 1917, Henry Dixon Morrison and Frank Wyman Libby, at the oral request of the Barking Chemicals Co., Ld., entered into an agreement of guarantee with the London and South Western Bank, Ld., which agreement, so far as material, was as follows:—

"To the London and South Western Bank, Limited.

"In consideration of your making or continuing advances, or otherwise giving credit, or affording banking facilities or accommodation, or extending forbearance to Barking Chemicals Co., Ld. (hereinafter called 'the Customer').

"(1.) The undersigned hereby guarantee the payment, on demand made by you (or on the sooner determination of this guarantee), of all moneys which now are or shall, from time to time or at any time, be due to you from the customer, alone or jointly with any other person or persons or company, either on account current or for money advanced or paid or liability incurred, or in respect of any bills of exchange, promissory notes, or other negotiable securities upon which the company may be liable to you in any capacity (and whether such liability shall have matured or not at the date of such

SARGANT J. 1918 MORRISON v. BARKING CHEMICALS COMPANY.

demand or sooner determination), or on any other account whatsoever. . . . . "

" (2.) This guarantee shall be a continuing guarantee to the extent at any time of five thousand pounds (5000*l.*) only for principal, together with interest thereon calculated as aforesaid from the time of such demand or sooner determination, and this guarantee shall not be considered as wholly or partially satisfied by the liability of the customer to you being at any time or times reduced or extinguished or by his account with you being at any time or times in credit . . . . . "

" (6.) This guarantee shall apply to and secure any ultimate balance that shall remain due to you, and you may enforce this security against the undersigned, or (if more than one) all or any of them, notwithstanding that any bills or other instruments covered by it may be in circulation or outstanding."

" (7.) For the purpose of this guarantee, and notwithstanding the bankruptcy of the customer, moneys once due shall be deemed to remain due until wholly repaid or satisfied, and a liability, whether contingent or matured, once subsisting shall be deemed to remain a liability until wholly discharged."

" (8.) The undersigned, or (if more than one) any of them, or his representatives may, by giving to you three calendar months' previous notice in writing (but not otherwise), determine this guarantee, so far as regards himself or his representatives, and at the expiration of such notice the extent of the liability of the undersigned, who or whose representatives shall have given such notice, except as to future interest, shall be ascertained, but no such notice shall prejudice the efficacy of this guarantee as a continuing guarantee, so far as regards the other or others (if any) of the undersigned who or whose representatives shall not, for the time being, have given such notice. The death of the undersigned or any of them shall not determine this guarantee. . . . . "

" (10.) A demand by you for payment under this guarantee shall be in writing, and may either be given to the undersigned or his or their representatives personally, or left at or sent by post to his or their usual or last-known address."

About the end of June, 1918, Morrison became apprehensive,

as large issues were being made by the company of debentures which would take precedence of its ordinary contracts with creditors, and he asked the company to relieve him from his liability under the guarantee.

In a letter of June 28, 1918, Morrison's solicitor accordingly wrote on his behalf to the company, referring to the overdraft and saying: "This overdraft should have been paid long ago, and I am instructed by my client to notify you that he requires you to pay off same at once or to arrange with the bank to relieve him of his liability as guarantor."

On July 11, 1918, the solicitor wrote to the company again, saying that, unless satisfactory arrangements were made at once, he should "request the bank to call in the loan so as to put an end to my client's liability" (that, as Sargant J. said in his judgment, being "a method of putting an end to the transaction other than the two methods especially provided for by the guarantee").

On August 3, 1918, the plaintiff's solicitor wrote to the company a letter in which was the following passage: "I have therefore received instructions to give notice to the bank that my client withdraws his guarantee, which I propose to do unless arrangements are at once made whereby the overdraft is repaid, or the guarantee of some other person substituted for that of my client."

Morrison did not in fact adopt either of these courses, but, as nothing satisfactory was done to relieve him, he began the present action.

The statement of claim alleged, and the defence admitted, that the defendant company was indebted to the bank in a sum not exceeding 5000*l.*, and the company's counsel admitted that this was so at the hearing, although the actual amount varied from day to day.

The action was tried on December 18, 1918.

Harold Simmons for the plaintiff. The plaintiff, being liable as surety, is entitled to ask the Court to compel the company, as the principal debtor, to pay the 5000*l.* admitted to be due to the bank and to relieve him from his liability as surety:

SARGANT J. 1918 MORRISON v. BARKING CHEMICALS COMPANY.

Wolmershausen v. *Gullick*. (1) It is not necessary that the creditors should have demanded payment: *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2) Clause 8 of the guarantee does not affect the surety's right to call on the principal debtor to pay, or otherwise affect the principal debtor; it only affects the relation between the surety and the creditor and gives the former, within limitations, certain additional rights.

A. Grant K.C. and *T. Edwards Forster* for the defendant company. The surety cannot succeed in his action without showing that there is an actual accrued debt in respect of which the principal debtor is liable to be sued: *Earl of Ranelaugh* v. *Hayes* (3); *Nisbet* v. *Smith* (4); *Rouse* v. *Bradford Banking Co.* (5); *Wooldridge* v. *Norris* (6); *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (7); and *Mathews* v. *Saurin*. (8) Where, as in this case, a demand for payment is a condition precedent to the liability of the surety, he must prove a demand in order to found a cause of action on the guarantee: *Bradford Old Bank* v. *Sutcliffe* (9); *In re Brown's Estate*. (10) In *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2) Swinfen Eady J. treated the creditor bank's letter of December 5, 1908, as a demand. When the present action was commenced the amount due under the guarantee was an unascertained sum; the bank had not demanded payment; and no notice had been given to the bank by the plaintiff to determine the guarantee. The plaintiff, therefore, is not entitled to the immediate relief from liability which he claims.

[Reference was also made to *In re Crace* (11); *Whittaker* v. *Kershaw* (12); *Hobbs* v. *Wayet* (13); Hart on Banking, 3rd ed., p. 765; and Paget on Banking, 2nd ed., p. 374.]

Cur. adv. vult.

Dec. 20, 1918. SARGANT J. The plaintiff here is one of

(1) [1893] 2 Ch. 514.
(2) [1909] 2 Ch. 401.
(3) (1683) 1 Vern. 189.
(4) (1789) 2 Bro. C. C. 579.
(5) [1894] A. C. 586.
(6) (1868) L. R. 6 Eq. 410.
(7) (1882) 22 Ch. D. 561.
(8) (1893) 31 L. R. Ir. 181.
(9) [1918] 2 K. B. 833.
(10) [1893] 2 Ch. 300.
(11) [1902] 1 Ch. 733.
(12) (1890) 45 Ch. D. 320.
(13) (1887) 36 Ch. D. 256.

two co-sureties for the defendant company under a guarantee dated August 22, 1917, and given to the London and South Western Bank, Ld., for the purpose of securing, to the extent of 5000*l.*, all liabilities of the defendant company on account current or otherwise.

The plaintiff is in this action seeking to compel the defendant company to give the plaintiff immediate relief or indemnity against any existing or apprehended liability to the bank under the guarantee. The guarantee is expressed to be "in consideration of your making or continuing advances, or otherwise giving credit, or affording banking facilities, or extending forbearance" to the Barking Chemicals Co., "hereinafter called 'the customer.'"

[His Lordship read the material parts of clauses 1, 2, 6 and 7 of the guarantee, and continued:] I do not think that clause 7 is really material to the present case; I think it is directed to preventing its being said, if the customer went bankrupt, that his debts had ceased to be debts by becoming a charge in the bankruptcy, and were not therefore within the guarantee. [His Lordship then read clauses 8 and 10 of the guarantee, and, after stating the facts subsequent to the guarantee, continued:] I think the letter of August 3, 1918, is a letter which clearly points to an intention on the part of the surety to give notice under clause 8 to determine the guarantee, in which case the amount due on the current account would be ascertained at the end of three months, and the corresponding liability of the surety would also be ascertained. All this is a matter of history and does not really affect the rights of the parties which I have to determine now. I merely mention this so as to show that the plaintiff was not ignorant of his rights. However, as a matter of fact the defendant company did not see their way to take any steps; they allowed matters to remain in statu quo, and the plaintiff did not in fact take either of the steps which he had threatened to take in the two letters of July 11 and August 3. He did not write to the bank asking them to put an end to the current account—or the loan as he called it—and he did not give notice to the bank that the plaintiff withdrew his guarantee; but, after waiting a

SARGANT J. 1918 MORRISON v. BARKING CHEMICALS COMPANY.

considerable time—I think I ought to say that the plaintiff was very reasonable in his conduct; he gave the defendant company every opportunity of arranging matters and did not press them in any hostile spirit at all—he commenced these proceedings asking for the relief that I have mentioned.

The statement of claim alleges, and the defendant company's defence contained what amounted to an admission, that there was a sum due at the time the defence was delivered of 5000*l.* The amount, of course, is fluctuating from day to day, and Mr. Grant admitted that there was a sum exceeding 5000*l.* owing when he made the admission two days ago, and I think I may take it that he admitted that there was a large indebtedness. What the amount is to-day of course I do not know.

The plaintiff relied on the important case of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) as establishing his right. But that case differs from the present in what appears to me the all-important point that the guarantee there had come to an end and the amount payable under the guarantee had been ascertained; and it also differs in another point on which counsel for the defendant company laid much stress, but which hardly seems to me vital—namely, that there the bank, in taking the initiative in recovering from the surety, had not to make a previous demand, while here it would have to do so. The scheme of the guarantee seems a fairly simple one. It is a guarantee to secure, to a limited extent, an ultimate balance found to be due from the company to the bank on the result of the current transactions between them, and it is contemplated as continuing until terminated on the initiative either of the bank or of the surety. In the former event the bank closes the account, ascertains the amount due from the customer, and the corresponding amount due from the surety, and makes a demand on the surety accordingly. In the latter event the surety gives the bank three previous months' notice to determine the guarantee, and at the expiration of that period the amounts due from the customer and from the surety respectively are ascertained, and the latter amount, as well as the former, becomes payable without more.

(1) [1909] 2 Ch. 401.

Under this scheme, though there may be an expectation or anticipation of liability on the part of the surety throughout the continuance of the current dealings between the customer and the bank, there is no accrued or definite liability on the part of the surety until there has been some such termination and ascertainment as I have stated. In this state of things the reason given in *Earl of Ranelaugh* v. *Hayes* (1) for the interposition of the Court does not seem to me to exist. There is no cloud to hang over the surety, at any rate for more than the three months mentioned in the guarantee. He can by the very terms of the instrument cause his liability to be definitely ascertained at the expiration of the three months. And counsel for the defendant company admitted on behalf of the defendant company that, if and when this is done, there will be an immediately enforceable liability on the part of the surety to the bank, and that he will then be within the decision of *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (2) It may be remarked in passing that the effect of the admission will be at least to clear the way for the plaintiff in the future, and to make him safe in giving notice now to determine the guarantee with a view to getting relieved of his liability in the course of another three months or so. But, beyond the fact that the interposition of equity is not required in this case, it seems to me that to hold the surety entitled at any time to call on the principal debtor to ascertain and pay off the amount due on the current account, or that part of it guaranteed by the surety, would be inconsistent with the general nature of the transaction between the parties. This indeed is brought out when the exact nature is considered of any order to which the surety might be entitled. To direct mere payment off of the amount actually due on the current account on the day of judgment would be ineffective. For so long as the current account continues fresh balances will, or may, from time to time, fall due to the bank, and the liability to have a future balance ascertained and brought within the terms of the guarantee will apparently continue.

When I asked counsel for the plaintiff what was the exact

(1) 1 Vern. 189. (2) [1909] 2 Ch. 401.

SARGANT J. 1918 MORRISON v. BARKING CHEMICALS COMPANY.

order that he asked for he said it was an order that the defendants should pay to the plaintiff 5000*l.*, the plaintiff undertaking to pay that sum to the bank in discharge of his liability. And, alternatively, he asked for a declaration that the defendants are liable to pay the bank 5000*l.*, and an order on them to pay that amount to the bank with a direction by them to the bank to appropriate that sum to payments of the plaintiff's liability. The vice of both these proposed orders is that they appear to assume an existing liability on the plaintiff to pay the bank 5000*l.*, which is not the fact; but beyond that, each of these orders seems to be enforcing a bargain different from that which the parties entered into. Practically the plaintiff has in one shape or another to ask for an immediate determination of his liability and an immediate discharge of his liability, and this is in conflict with the bargain, which provides for an ascertainment of his liability at a future date.

I desire to add that I have not to deal with the case, which was much debated before me, of what would happen if the bank took the initiative in closing the current account and then abstained from making a demand on the surety. The case is not a probable one. But I must not be assumed to acquiesce in the argument of counsel for the defendant company that in such a case the surety could not clear himself, as in *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* (1) The surety might be in as great peril as in the case supposed, although there might be no complete cause of action until demand. I am assuming, of course, that the guarantee was not determined, or liable to be determined, by the surety.

I dismiss the action, with costs.

Solicitors: *Bernard Baines; Birkbeck, Yeo & Co.*

F. E.

(1) [1909] 2 Ch. 401.

In re C. R. SAWYER AND WITHALL, SOLICITORS.

SARGANT J.

1919 June 6, 27.

Solicitor and Client—Costs—Taxation—Lease—Rack Rent—"Long lease not at rack rent"—Solicitors' Remuneration Act, 1881 (44 & 45 *Vict.* c. 44)—*General Order thereunder, Sched. I., Part* 2—*Scale Fee.*

The object of the general order under the Solicitors' Remuneration Act, 1881, is to introduce a short and simple method of ascertaining the cost of ordinary conveyancing matters, including leases, and the scale of fees is based on the bargain actually made between the lessor and lessee as appearing on the face of the document.

A sub-lease of a messuage in London for sixty-one and a half years at a rent of 525*l.* contained, inter alia, full repairing covenants by the lessees. The rent was the full market rent obtainable upon the terms of the lessees undertaking the obligations in the lease. Upon a summons by the lessors' solicitors to review the taxation of their bill of costs, made under a third party order obtained by the lessees, the solicitors claimed that the lease in question was a long lease not at rack rent, and came under the second set of scale charges in Sched. I., part 2, of the general order, and that the scale fee chargeable was 42*l.* 15*s.*:—

Held, that the lease was a long lease at rack rent within the first set of scale charges under the order, and the scale fee was 17*l.* 10*s.*

The definitions of "rack rent" in 2 Blackstone's Commentaries, p. 43, and by Holmes L.J. in *Ex parte Connolly to Sheridan and Russell* [1900] 1 I. R. 1, 6, discussed and applied.

ADJOURNED SUMMONS.

This was a summons by Messrs. C. R. Sawyer and Withall, solicitors, to review the taxation of their bill of costs, and raised the question whether a certain lease was a lease at rack rent within the first set of scale charges in Sched. I., part 2, of the General Order made under the Solicitors' Remuneration Act, 1881, or was "a long lease not at rack rent" within the second set of scale charges. The lease in question was dated December 24, 1918, and was a sub-lease granted by the lessees from the freeholder, Lord Howard de Walden, and by the mortgagees of the lessees, and by it a messuage Nos. 59 and 61, New Cavendish Street, Marylebone, in the County of London, was demised to Messrs. Mayer and Phelps from Michaelmas, 1918, for 61½ years at a yearly rent of 525*l.*; and the lessees entered into covenants to pay rent, land tax, sewer rates, etc., and to do all repairs and

SARGANT J. 1919 C. R. SAWYER AND WITHALL, *In re.*

insure the premises against fire, and to perform other lessees' covenants similar to those contained in the head lease. The lease in question carried the possession of the basement, ground floor, and first floor of the premises, but as to the three upper floors subject to short leases or tenancies in favour of occupying tenants. These tenancies were at rents inclusive of all rates and taxes, and without any obligation on the tenants to effect any repairs to the structure of the premises. The lease was the outcome of somewhat protracted negotiations and, as appeared by the correspondence, was at the full market rent that could be obtained for the property on the terms of the lessees undertaking the obligations in question. If the property had been let on the terms of repairs being done by the lessors the full rental value of the property would appear to have been about 20 per cent. higher. The lessees obtained a third party order for the taxation of the costs of the lessors' solicitors, and claimed that the lease was at a rack rent and the scale fee chargeable was 17*l.* 10*s.* The solicitors claimed that the scale fee was 42*l.* 15*s.* in respect of "a long lease not at rack rent." Both parties agreed that the lease was a long lease, and the only question was whether it was or was not at a rack rent. The taxing Master, after consulting other taxing Masters, finally made a certificate dated May 9, 1919, disallowing the solicitors' objections and holding that it was a long lease at rack rent, and did not come under the second scale fee.

Beebee for the summons. The question is what is the meaning of "a long lease not at rack rent"? In the present case the lease being a full repairing lease for sixty-one years is a long lease, and it is submitted that the rent is not "a rack rent" within the definition of Blackstone in 2 Bl. Com. 43, where it is defined to be "a rent of the full value of the tenement, or near it." Here that value is diminished by the covenant by the tenants to repair. In Stroud's Judicial Dictionary, 2nd ed., vol. iii., p. 1643, the definition of Blackstone is quoted, and the cases referred to in support of it. The rack rent, or "full annual value," is the rent

which a tenant pays on the terms that he pays the rates and taxes, and the landlord pays for the repairs and insurance of the premises, but it is not a rack rent when the tenant does the repairs and insures. That would appear to be so from the definitions in the Local Government Acts, the Public Health Act, 1875, where a definition of rack rent is given as not less than two-thirds of the full net annual value, and in the Income Tax Acts: *In re Negus* (1); *Stevens* v. *Barnet District Gas and Water Co.* (2); *Usher's Wiltshire Brewery, Ld.* v. *Bruce* (3) *Ex parte Connolly to Sheridan and Russell* (4); *Stevens* v. *Bishop.* (5)

In determining what is a rack rent regard must be had to the circumstances of the letting and the covenants in the lease, and not only to the figure stated in the deed. The strict legal meaning of the term is different from that used in ordinary parlance. [He also referred to *In re Hogan's Estate* (6), which was a case of a building lease at rack rent, and to Cordery on Solicitors, 3rd Ed. p. 289.]

J. W. Manning for the respondents. If the applicant is right there is an omission in the order to provide for determining the costs which lessees would have to pay in cases of repairing leases which are of daily occurrence.

In re Negus (1) is in favour of my contention. Here it is an ordinary lease at a rack rent with the usual covenants. The 525*l.* rent was the best rent that could be obtained after negotiation. It is a question of fact what is a rack rent, and here it was the full amount which the lessors were able to get for the premises on the footing that the lessees were liable for the repairs. It is a fallacy to take definitions of rack rent from statutes which were passed for special purposes, and the definitions contained in them cannot be read into the old legal definition of rack rent. The cases cited have no real meaning, therefore, upon the present case. *Stevens* v. *Barnet District Gas and Water Co.* (2) was a rating case, and not one of a bargain between lessor and lessee. The

(1) [1895] 1 Ch. 73.
(2) (1888) 36 W. R. 924.
(3) [1915] A. C. 433, 454.
(4) [1900] 1 I. R. 1.
(5) (1888) 57 L. J. (Q. B.) 283, 287.
(6) [1894] 1 I. R. 503.

SARGANT J. 1919 C. R. SAWYER AND WITHALL, *In re.*

only question here is whether the full annual value which the lessor could extract from the lessee was in fact obtained. The taxing Master fluctuated in his view, but ultimately came to a right decision.

Beebee in reply. The various Acts referred to illustrated what the Legislature took to be the clear meaning of "rack rent."

Cur. adv. vult.

June 27. SARGANT J., after stating the facts, continued: Rack rent has been defined in 2 Blackstone's Commentaries, p. 43, as "only a rent of the full value of the tenement or near it"; and in a judgment of Holmes L.J. in *Ex parte Connolly to Sheridan and Russell* (1) is defined thus: "a rack rent in legal language means a rent that represents the full annual value of the holding." The first of these definitions is not a very precise one, and accords substantially with the rough popular idea of a rack rent. But both definitions would appear at first sight to include the rent now in question. But it is argued on behalf of the solicitors that the true technical meaning of "full annual value," and therefore of rack rent, is the rent a tenant would pay on the terms of the tenant's paying rates and taxes and the landlord's repairing and insuring, and references have been made to Local Government and Income Tax statutes and to decided cases in relation to the same subject-matter, such as *Stevens* v. *Barnet District Gas and Water Co.* (2) and *Usher's Wiltshire Brewery, Ld.* v. *Bruce.* (3)

In my judgment, however, these statutes and cases are not really relevant; the matter has to be decided on the fairly plain intention and object of the order in question having regard to its subject-matter; and this intention and object would be frustrated to a large extent were any such precise meaning given to the term rack rent in this order as is contended for by the solicitors. The object of the order plainly is to introduce a short and simple method of

(1) [1900] 1 I. R. 6. (2) 36 W. R. 924.
(3) [1915] A. C. 433.

ascertaining the cost of ordinary conveyancing matters, including leases. In the case of leases the charge is to be on an ad valorem scale or series of scales based on the contractual value of the property and on the nature of the transaction. In leases, such, for instance, as occupation leases, where the money consideration is obtained entirely in the shape of rent and the interest of the lessees has prima facie no pecuniary value, the measure of value taken for ascertaining the scale charge is the rent actually reserved by the lease.

On building leases and other long leases, where in general the interest of a lessee is of value and the rent in general represents much less than the full value of the whole property included, or to be included, in the demise, the measure of value is still the rent actually paid by the lessee; but the scale charge is at a much higher rate than in the case of such leases as occupation leases. In transactions where the lease is at a premium, or the money consideration is represented partly by rent and partly by a capital sum, the scale charge is calculated both on the rent and on the capital consideration. But throughout the scale fee is based on the bargain actually made between the lessor and the lessee as appearing on the face of the document. And further, it is fairly clear that the order intends to include within its ambit all ordinary leases, mining leases being the only documents excepted in terms.

Now, it is common knowledge that in London and many other parts of the country, especially the southern districts, occupation leases of good-sized houses are in general granted on terms under which, as in the present case, the lessees do the repairs and pay rates and taxes. And, on the other hand, in the case of leases of flats or upper parts the ordinary terms are (as in the case of the flats here) terms under which the lessor not only does repairs, but also pays rates and taxes. But in either of these cases, according to the contention of the solicitors, there is no letting at a rack rent, because, in the first case, the rent actually reserved is too low, by reason of the tenant's obligation to repair, while in the latter case the rent reserved would be too high for a rack rent by reason

SARGANT J. 1919 C. R. SAWYER AND WITHALL, *In re.*

of the landlord's obligation to pay rates and taxes. Accordingly, in all these cases the order would not apply, and the costs chargeable would have to be ascertained under the old system. Indeed, in the case of leases which are not long leases, the order would apply only where the lease was on the terms of the landlord doing repairs and insuring and of the tenant paying rates and taxes, and where accordingly the conventional or contractual rent corresponds with the theoretical rack rental value. It seems to me that such a construction of the order would be intolerably narrow and technical, and would result in a quite undue limitation of its beneficial application; and I do not think that the phrase "rack rent" has any such absolutely definite and inflexible legal meaning as has been contended for. In my judgment the definition of rack rent by Holmes L.J. in the case above referred to, or indeed the looser definition of Blackstone, is sufficiently definite for the purposes of the order, and applies whether the rent reserved in the lease has been calculated on the basis of the obligations as to rates and taxes and the obligations as to repairs being borne wholly by the tenant or wholly by the landlord, or partly by the one and partly by the other. And I am glad to be informed that the practice of the taxing Masters with regard to ordinary repairing occupation leases has been to treat them as within the order. I dismiss the summons with costs.

Solicitors: *C. R. Sawyer & Withall; Parry, Gibson & Oldershaw.*

G. M.

P.O. LAWRENCE J.

1919

July 11.

SECRETARY OF STATE FOR WAR *v.* COPE.

[1919 W. 1129.]

Practice—Action by the Crown—Infringement of registered Design—Interim Injunction—Undertaking in Damages—Defence Act, 1842 (5 & 6 *Vict. c.* 94), *s.* 34—*Ordnance Board Transfer Act*, 1855 (18 & 19 *Vict. c.* 117), *ss.* 3, 4.

The settled rule of the Court that in actions by the Attorney-General on behalf of the Crown an undertaking in damages will not be imposed when granting an interlocutory injunction also applies where the Secretary of State for War sues in respect of property vested in him or under his control or disposition on behalf of the Crown.

Secretary of State for War v. *Chubb* (1880) 43 L. T. 83 not followed.

MOTION.

The writ in this action was issued on June 27 by His Majesty's Principal Secretary of State for the War Department and claimed an injunction to restrain the defendant, her servants and agents from selling or exposing for sale any ribbon of a design which was the same as, or was a fraudulent or obvious imitation of, the plaintiff's registered design, No. 665,843, being the design for the British War Medal ribbon, and from otherwise infringing the plaintiff's said registered design or his copyright therein.

On July 4 Astbury J., on an ex parte application on behalf of the plaintiff, granted an interim injunction extending over July 11, the usual undertaking in damages being given.

On July 11 the motion came on for hearing.

Jenkins K.C. and *Austen-Cartmell* for the motion.

Sebastian for the defendant. I ask for an adjournment for a week to answer the plaintiff's evidence. Of course I consent to the injunction being continued and I understand there will be no objection to the usual undertaking in damages being given.

Jenkins K.C. I do object. Last week I voluntarily gave the usual undertaking in damages but I do not propose to renew it now. The Crown never gives an undertaking in

P.O. LAWRENCE J. 1919 SECRETARY OF STATE FOR WAR v. COPE.

damages and, although the Attorney-General is not suing, the Crown is suing by the Principal Secretary of State for War and I contend that the same principle applies. It is true that in *Secretary of State for War* v. *Chubb* (1) Sir George Jessel required the undertaking to be given, but his decision was virtually overruled by the Court of Appeal in *Attorney-General* v. *Albany Hotel Co.* (2), where the Attorney-General was suing on behalf of the Crown, and the practice and the authorities are dealt with in the considered judgment of North J. Here the Secretary of State for War who is, by ss. 3 and 4 of the Ordnance Board Transfer Act, 1855, substituted for the Principal Officers of Ordnance mentioned in s. 34 of the Defence Act, 1842, is suing under s. 34 in respect of " property " vested in him or under his disposition on behalf of the Crown—this registered design is property—and the section expressly reserves all the privileges and prerogatives of the Crown in any action or proceedings as if the Crown were a party thereto : the legislation on the matter is set out in Halsbury's Laws of England, vol. vii., pp. 95, 96. It is submitted that this is just as much a Crown action as when the Attorney-General sues, and the motion is no longer ex parte because the defendant is represented by counsel.

Sebastian. In the Annual Practice, 1918 ed., p. 853, the case of *Secretary of State for War* v. *Chubb* (1) is distinguished from *Attorney-General* v. *Albany Hotel Co.* (2) This is not a case of the Crown suing. In point of fact the Secretary of State for War has placed himself in the same position as any other member of the public, because he has applied in his own name to the Patent Office for the registration of a design and has placed himself in the position of the registered proprietor of the design. The defendant's business has been stopped and damage has been caused. It is submitted that the plaintiff is bound to give the undertaking, but if he is not bound to do so he ought to voluntarily agree to give it.

P. O. LAWRENCE J. In this case I do not think that the

(1) 43 L. T. 83. (2) [1896] 2 Ch. 696.

plaintiff ought to be required to give the undertaking. The plaintiff is the Secretary of State for War who is suing under the Defence Act, 1842, s. 34, which provides that the Principal Officers of His Majesty's Ordnance—now the Secretary of State for War—may prosecute "any other action"— that is, other than the actions dealt with in the previous part of the section—"suit or legal proceedings, civil or criminal, concerning the goods or chattels, stores, moneys, and other property, under the care, control, and disposition of the said principal officers." The section further enacts that nothing therein contained shall be taken to defeat, or abridge in any such action the legal rights, privileges and prerogatives of the Crown, and that in all such actions and in all matters relating thereto all the same rights, privileges and prerogatives claimed, exercised and enjoyed by the Crown in any court of law or equity may be claimed, exercised and enjoyed by the Secretary of State for War in the same manner as if the subject-matter of the suit or other proceeding were vested in the Crown, and as if the Crown were actually a party thereto. Now it is an established rule that the condition of giving an undertaking in damages when an interlocutory injunction is granted by the Court will not be imposed upon the Crown nor upon the Attorney-General suing on behalf of the Crown. The Crown has the privilege (which is denied to the subject) of being able to obtain an interlocutory injunction without being required to give an undertaking in damages. It follows in my opinion from the express words of s. 34 itself, that this privilege extends to the Secretary of State for War in all cases in which he is suing under that section.

The case of the *Secretary of State for War* v. *Chubb* (1) has been referred to, and I think the comments of North J. upon that case in *Attorney-General* v. *Albany Hotel Co.* (2) are well founded. The learned judge did not understand the reason why the Master of the Rolls in that case departed from what had then been the established practice for many years of not requiring an undertaking in damages from the

(1) 43 L. T. 83. (2) [1896] 2 Ch. 696.

P. O. LAWRENCE J. 1919 SECRETARY OF STATE FOR WAR v. COPE.

Crown. The shorthand notes appear to have been before the learned judge, and from these he appears to have gleaned that a distinction was taken by reason of the fact that the Secretary of State for War was suing in respect of property vested in him as a corporation. I fail to appreciate the distinction; the property was vested in him, not for his own benefit but on behalf of the Crown. On principle I am of opinion—quite apart from the wording of s. 34—that when the Crown is the real plaintiff, the same rule ought to apply whether the action happens to be brought in the name of the Attorney-General or in that of an officer of State in whom property is vested on behalf of the Crown. It is not suggested that if an undertaking in damages were given in the present case the Secretary of State for War would personally have to bear any damages which might be recovered under such an undertaking. Obviously they would have to be paid by the Crown. In the result I decline to follow the decision in the case of the *Secretary of State for War* v. *Chubb* (1) and I hold that in an action brought by the Secretary of State for War under s. 34 of the Defence Act, 1842, the Court ought not to impose the condition of an undertaking in damages when granting an interlocutory injunction. The injunction therefore will go for a week without any undertaking in damages by the plaintiff.

Solicitors: *The Treasury Solicitor; Jonathan E. Harris.*

(1) 43 L. T. 83.

H. L. F.

CROFT *v.* WILLIAM F. BLAY, LIMITED.

C. A.
1919
May, 28, 29, 30.

[1918 C. 1726.]

Landlord and Tenant—Lease for one Year and Part of Another—Holding over—Implied Tenancy from Year to Year—Date of Commencement—Notice to quit.

By an agreement dated November 15, 1915, the plaintiff let premises to the defendant "for the term of one year and one-eighth of another year from November 11, 1915, at the yearly rent of 40*l*, payable quarterly on the usual quarter days, the first payment to be for the half-quarter ending December 25, 1915, and to be the sum of 5*l*." On the expiration of the term at Christmas, 1916, the defendant held over without any further agreement, and the plaintiff accepted the quarter's rent due on Lady Day, 1917:—

Held, that the defendant was tenant from year to year under an implied tenancy commencing at Christmas, 1916, and that a notice given by him on June 8, 1917, to quit on December 25, 1917, was valid.

The statement, first appearing in Cole on Ejectment, p. 50, and since repeated in other text-books, that, "generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly," is not supported by the cases relied upon as authority for it.

Decision of Astbury J. [1919] 1 Ch. 277 affirmed.

APPEAL from a decision of Astbury J. (1)

By an agreement dated November 15, 1915, and made between the plaintiff of the one part and the defendant of the other part the plaintiff agreed to let and the defendant to take certain premises "for the term of one year and one-eighth of another year from November 11, 1915, at the yearly rent of 40*l*. payable quarterly on the usual quarter days, the first payment to be for the half quarter ending December 25, 1915, and to be the sum of 5*l*."

The original term having expired on December 25, 1916, the defendant held over without any further agreement, and the plaintiff accepted payment of the quarter's rent due on Lady Day, 1917.

On June 8, 1917, the defendant gave notice to quit at

(1) [1919] 1 Ch. 277.

C. A. 1919

CROFT v. WILLIAM F. BLAY, LD.

Christmas, 1917. The plaintiff took the view that the defendant was a yearly tenant under an implied tenancy commencing on November 11, 1916, that being the anniversary of the commencement of the original term, and he contended that the notice to quit was invalid.

Upon an originating summons taken out for the purpose of determining the question Astbury J. held that the implied yearly tenancy commenced at Christmas, 1916, and that the notice to quit was good.

The plaintiff appealed.

Lyttelton Chubb for the appellant (landlord). The question is whether, where there is an express tenancy for a year and a fraction of a year, and the tenancy has been continued by holding over from year to year, the yearly tenancy is to be deemed to have commenced on the anniversary of the creation of the original term or on that of its termination. It is a fallacy to say that the tenancy from year to year is a new tenancy. It is a continuation of the old tenancy. The whole point in this case is whether it is a new tenancy. If it is, then the respondent is right. A tenancy is not necessarily a new tenancy because it is one implied by law. The tenancy commences at the time prescribed by the agreement. Here the tenancy was a continuation of the old tenancy which commenced on November 15, 1915, the date specified in the agreement. The tenant gave notice to quit in June, and was therefore too late. Astbury J. has held that the tenancy was a new tenancy commencing at Christmas. That may be a rational view to take, but it is not in accordance with the law. The judge commented on the fact that there was no evidence when the tenant entered into occupation of the premises, but that was not material, because the agreement prescribes the date of the commencement of the tenancy. The rule is thus stated in Halsbury's Laws of England, vol. xviii., p. 448: "Where a lease is for a certain number of years and a part of another year, and the tenant holds over and becomes yearly tenant by payment of rent, the current

year of the yearly tenancy is treated as ending on the anniversary of the commencement of the term and not on that of its determination." Here the agreement contains no provision when notice should be given to determine the tenancy. At the end of the period fixed by the agreement either party could have terminated the tenancy without notice. The question is what notice was necessary to be given if the tenancy was continued by payment of rent. The tenancy must be treated as commencing on November 15, 1915.

[DUKE L.J. Your proposition is a startling one.]

It is generally accepted by text-writers on the subject.

[WARRINGTON L.J. referred to Woodfall on Landlord and Tenant, 19th ed., p. 418.]

That edition of Woodfall is dated in 1863, shortly after the decision in *Doe* v. *Dobell.* (1) All the text-books on landlord and tenant from 1863 downwards have laid down the rule as I have stated it.

In *Sidebotham* v. *Holland* (2) A. L. Smith L.J. says: "It appears upon looking into the old authorities that at one time what was to be considered a reasonable notice to quit was not ascertained; but, subsequently, it became settled law that in cases of yearly tenancies half a year's notice, expiring at that period of the year at which the tenancy commenced, was the reasonable notice to be given."

A yearly tenancy created by holding over must determine on the anniversary of the commencement of the original term: *Doe* v. *Dobell.* (1) The only distinction between that case and the present is that there three months' notice instead of six months' notice was required. The decision was that the notice was rightly given for the anniversary of the commencement of the term of one year and six months. That is an express decision on the point now before the Court. I also rely upon *Berrey* v. *Lindley.* (3)

[WARRINGTON L.J. You agree that the judgment of Tindal C.J. lays down no principle at all?]

(1) (1841) 1 Q. B. 806; 1 G. & D. 218.

(2) [1895] 1 Q. B. 378, 387.

(3) (1841) 3 Man. & G. 498.

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD.

Yes: the text-books have assumed that the law is as there laid down by Coltman J., that the notice to quit is governed by the date of the original entry. See Woodfall on Landlord and Tenant (19th ed.), p. 418; Fawcett on Landlord and Tenant (3rd ed.), p. 471; Redman on Landlord and Tenant (6th ed.), p. 561; Foà on Landlord and Tenant (5th ed.), p. 593; 2 Smith's Leading Cases (12th ed.), p. 123; and Cole on Ejectment (1857), p. 50. Mr. Cole was the editor of the 8th ed. of Woodfall.

[EVE J. referred to *Doe* v. *Lines*. (1)].

That was the case of holding over by an underlessee and is an exception to the rule.

In 3 Bythewood and Jarman's Conveyancing (4th ed.), p. 279, it is stated that "where the original lessee holds over after the determination of the lease, the implied tenancy created by payment and acceptance of rent, will be deemed to have commenced from the date which corresponds to his entry under the lease, and not from the determination of the lease": *Roe* v. *Ward* (2); *Doe* v. *Weller* (3); *Doe* v. *Dobell* (4); *Humphreys* v. *Franks* (5); *Kelly* v. *Patterrson* (6); and *Berrey* v. *Lindley* (7) are there cited.

[DUKE L.J. referred to *Doe* v. *Watts* (8)].

In *Kelly* v. *Patterrson* (6) Brett J. treated tenancies coming to an end by effluxion of time or by the death or cesser of title of the lessor on the same footing. In either case, if the owner accepts rent from the tenant in possession he adopts him as yearly tenant on the old terms so far as applicable to the continued tenancy. The termination of the original term is gone, but the commencement remains and settles the anniversaries of the date for which notice to quit must be given. In this case the commencement of the original term was November 11, 1915, and it cannot be inferred that the yearly tenancy began at Christmas: *Sidebotham* v. *Holland*. (9)

[WARRINGTON L.J. referred to *Doe* v. *Johnson*. (10)]

(1) (1848) 11 Q. B. 402.
(2) (1789) 1 H. Bl. 97.
(3) (1798) 7 T. R. 478.
(4) 1 Q. B. 806.
(5) (1856) 18 C. B. 323.
(6) (1874) L. R. 9 C. P. 681.
(7) 3 Man. & G. 498.
(8) (1797) 7 T. R. 83.
(9) [1895] 1 Q. B. 378.
(10) (1806) 6 Esp. 10.

But see the judgment of Lindley L.J. in *Sidebotham* v. *Holland*. (1)

The comment upon *Doe* v. *Lines* (2) by Brett J. in *Kelly* v. *Patterrson* (3) is right.

Micklem K.C. and *Foà* for the respondent. The position of a tenant who holds over on the expiration of his original tenancy is well defined by Cozens-Hardy M.R. in *Morgan* v. *Harrison* (4): "There is ample authority that a tenant holding over after the expiration of a lease . . . . is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy."

And in *Dougal* v. *McCarthy* (5) Lord Esher says: "But, if after the expiration of a lease the jury find that by consent of both parties the tenant remained in possession as tenant, and nothing was said inconsistent therewith, the implication of law mentioned by Lord Mansfield arises, viz,, that there is a tenancy from year to year on the terms of the old lease so far as they are consistent with such a tenancy." That principle concludes the question of when notice must be given, because the date of the determination is one of the terms of the old lease and must be imported into the new tenancy. If a new relationship is created there is an end of this case. But it is said that no new relationship is created, but that there is a continuation of the original lease.

[DUKE L.J. It is put against you that the parties have agreed to a prolongation of an existing tenancy, and that unless there is something to show the contrary, the term must be taken to exist from the beginning of the old tenancy, and reliance may be placed on what was said by Buller J. in *Right* v. *Darby*. (6)]

That is turning the original tenancy into a yearly tenancy commencing on November 11, which it was not. The difficulty really arises from the erroneous statement which has been perpetuated in various text-books and which originated in Cole on Ejectments, p. 50. *Berrey* v. *Lindley* (7) and the

(1) [1895] 1 Q. B. 382.
(2) 11 Q. B. 402.
(3) L. R. 9 C. P. 681.
(4) [1907] 2 Ch. 137, 143.
(5) [1893] 1 Q. B. 736, 740.
(6) (1786) 1 T. R. 159.
(7) 3 Man. & G. 498.

C. A. 1919. CROFT v. WILLIAM F. BLAY, LD.

other cases upon which it purports to be founded are no authority for the statement. *Berrey* v. *Lindley* (1) was not a case of holding over. It was a yearly tenancy from the commencement. There are some text-books which do not contain the statement, e.g., Tudor's Leading Cases in Real Property. The authorities show that when a tenant enters in the middle of a quarter and there is a provision in the agreement that the first payment of rent shall be made on the next quarter day, then the year of the tenancy shall date from that quarter day: *Doe* v. *Johnson*. (2) *Doe* v. *Stapleton* (3) is an express authority in favour of the respondent. In *Doe* v. *Grafton* (4) there was a yearly tenancy from a particular date, and the rent was made payable quarterly on the usual quarter days. The tenancy was deemed to commence from the first quarter day. It is said that *Sidebotham* v. *Holland* (5) is against our contention, but that case turned on the express language of the agreement. The decision of Astbury J. was right on principle and on authority.

[DUKE L.J. It is said that the law as stated in the text-books has been generally accepted.]

There must be something in the nature of universality in order to bind the Court to act upon it. There is nothing to show that the error has been universally accepted.

[WARRINGTON L.J. It is not an error affecting title.]

Lyttelton Chubb in reply.

WARRINGTON L. J. The question in this appeal is whether a notice to quit given by the defendant and expiring at Christmas, 1917, was a valid notice, or whether the only valid notice would have been one which would expire on November 11, 1917. Astbury J. has held that the notice given was valid, and from his decision the landlord appeals. The facts are not in dispute and are very simple. [The Lord Justice stated the terms of the agreement of November 15, 1915, and continued :] As to the construction of that agreement there seems to be no doubt whatever. It was an agreement by which the premises

(1) 3 Man. & G. 498.
(2) 6 Esp. 10.
(3) (1828) 3 C. & P. 275.
(4) (1852) 18 Q. B. 496.
(5) [1895] 1 Q. B. 378.

were to be let for a definite term expiring at Christmas, 1916. Whether the tenancy began on November 11, the date from which the period fixed by the agreement was to run, may be a question, and there is no evidence to show when the tenant entered into possession, and at what date therefore the tenancy under this agreement began. The term unquestionably begins on November 11, 1915, and ends on December 25, 1916. But I will assume for the purposes of this judgment that not only did the term begin on November 11 but the tenancy began on that date, and expired at Christmas, 1916. The tenant did not give up and the landlord did not require possession. On March 25, 1917, the tenant paid and the landlord accepted a quarter's rent, that is to say, one-quarter of the yearly rent stipulated for by the agreement. The result of that was that the tenant thereupon became a tenant from year to year upon the same terms as expressed in the original agreement so far as such terms are applicable to a tenancy from year to year. The law on that subject is expressed far better than I can express it by Cozens-Hardy M.R. in *Morgan* v. *Harrison* (1), where he says: "Now there is ample authority that a tenant holding over after the expiration of a lease, if he pays rent or agrees to pay rent subsequently, becomes, if no other terms are suggested, a tenant from year to year—a yearly tenant; and there is ample authority that under those circumstances the tenant holding over is deemed to hold upon all the terms and conditions of the original tenancy so far as they are applicable to a yearly tenancy." The tenant therefore became a tenant from year to year. What was the year of that tenancy, dealing with the matter for the moment entirely apart from authority and on the facts as we know them? When did that tenancy from year to year commence and on what date did it determine? I think it quite clearly commenced when the fixed term ended, that is to say, at Christmas, 1916. The first year of it would end at Christmas, 1917, and the subsequent years if it were not in the meantime determined by a notice applicable to the case of a yearly tenancy would expire at Christmas in those subsequent years.

(1) [1907] 2 Ch. 137, 143.

C. A. 1919 — CROFT v. WILLIAM F. BLAY, LD. — Warrington L.J.

Not only does that appear to be plainly the effect of what took place, but it seems to me to be in accordance with obvious common sense. When a man has property which he wishes to let and finds a tenant in the middle of a broken quarter, but provides that the rent shall be paid quarterly, what is he thinking of? He is not thinking of the time when the term shall commence, what he is intending to define, and what the tenant is intending to define, is the period of the year at which the tenant shall give up and the landlord shall resume possession; in other words, they are creating what would be denominated a Michaelmas tenancy, a Christmas tenancy, a Lady Day tenancy, or a Midsummer tenancy according to the period at which it comes to an end. If I am right so far that this was a yearly tenancy commencing with the expiration of a fixed period of a year and one-eighth, that is to say, commencing as from Christmas, 1916, then that incident of a yearly tenancy which is undoubtedly a legal incident of such a tenancy—namely, that it is determinable on the anniversary of its commencement by a six months' notice unless there be any stipulation to the contrary, would be applicable to it, and the notice given in May, 1917, expiring at Christmas, 1917, would be not only a valid and sufficient notice, but would be the only notice which could effectually determine the tenancy. But it is said that so to decide is contrary to authority, and that authority compels us to come to the conclusion that there is a rule of law which prevents us from giving that construction and effect to the documents and the acts of the parties which I think ought to be given to them, and which compels us to come to the conclusion that the yearly tenancy which never had any existence until the determination of the previous fixed term is to be deemed to have commenced on the anniversary of the commencement of the fixed term, that is to say, in the present case to be deemed to have commenced not at the time the tenant began to hold over, but on November 11, 1916, while the original term was still subsisting. Of course if the authorities compel us to come to that conclusion we must give effect to them. Accordingly it is necessary to see what the authorities are and whether they do force us to come to a

conclusion which I am bound to say would be one entirely contrary to that which we ought to infer was the real intention of the parties. The matter stands in rather a curious way. There appeared in Cole on Ejectment, p. 50, which was published in the year 1857, a statement which I will read. I refer to it because it seems to me to be the fons et origo mali, if I may so describe it. "Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term; and notice to quit should be given accordingly." Then the author refers to a number of cases, some of which I will refer to later, but none of which, in that part of his note, are cases of holding over after the determination of a previous term by effluxion of time. So far as they are cases of holding over at all they are cases of holding over by the tenant and adoption by the landlord where the previous term has determined by a defect in the title of the lessor. After that passage he adds the following: "And this rule prevails even where the original term did not cease at the same time of the year as it commenced. Thus, where premises were originally demised for five and a half years, and an implied tenancy from year to year was afterwards created." For that he cites *Berrey* v. *Lindley* (1); *Doe* v. *Dobell* (2); and *Kemp* v. *Derrett*. (3) *Berrey* v. *Lindley* (1) and *Doe* v. *Dobell* (2) have been discussed before us, and I propose to say a word about them presently. He goes on: "There seems, however, to be some difference in this respect between a holding over by the original tenant, and by an under tenant, after the expiration of a term of 14½ years." Then he refers to *Doe* v. *Lines*. (4) That is the passage, and it is the middle of that passage beginning with these words: "And this rule prevails even where the original term did not cease at the same time of the year as it commenced," on which the present appellant relies as authority for the proposition for which he contends.

That statement in Cole appears verbatim in the later

(1) 3 Man. & G. 498.
(2) 1 Q. B. 806.
(3) (1814) 3 Camp. 510.
(4) 11 Q. B. 402.

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD. Warrington L.J.

editions of Woodfall on Landlord and Tenant, the earlier of which were edited by Mr. Cole himself; it is simply repeated in the words in which the first two passages of that statement in Cole on Ejectment appear in that book. A similar statement, though not in the same terms and not quite so strong and definite, appears in the later editions of some other text-books. It does not appear in all of them by any means. I need not mention those in which it does appear; some of them are text-books of great importance on this subject.

I now proceed to consider whether independently of the statement in the text-books there is any authority for the proposition that where a tenant is holding over after the expiration by effluxion of time of a previous lease for a period of years plus a fraction of a year, the implied tenancy from year to year must be deemed to have commenced on the anniversary of the commencement of the original term. Is there any authority for that proposition? In my opinion there is no such authority. The first case referred to by Mr. Cole is *Berrey* v. *Lindley*. (1) That was a somewhat peculiar case. An agreement was made by which a tenant entered into possession, and the agreement purported to be for five years and a half from Michaelmas, 1823. Notice was given to determine the tenancy at Michaelmas, 1835, that is to say, more than five years after the commencement of the tenancy, and it was held that that notice was valid. Of course if the original term of five and a half years had in law been a term of that period, then this would have been a case of holding over after the expiration by effluxion of time of a previously existing term, and it would have been a case in which a notice to quit expiring on the anniversary of the commencement of the original term and not on the anniversary of its determination would have been held to be a valid notice. But when you look at it there is one material fact which I have not yet stated, and that was that the original lease for a term of five and a half years was void by reason of the Statute of Frauds, consequently there was no definite term of five and a half years, but the tenant having been in possession and he having paid

(1) 3 Man. & G. 498.

rent and the landlord having accepted rent, he had been in fact a tenant from year to year from the beginning, with the possible stipulation, I will not say at the moment whether effectual or not, that that tenancy from year to year had the peculiar property that it might have been determined by a notice at the end of the first five and a half years. Whether that was so or not does not matter. The point is that that was a tenancy from year to year from the first; it was a Michaelmas tenancy, and it was held to have been rightly determined as a Michaelmas tenancy; there was no case of holding over at all, and for that reason it plainly does not support the proposition which is stated as I have said in the text-books.

The other case was *Doe* v. *Dobell.* (1) Both the reports are extremely meagre, and it requires some care and the exercise of some ingenuity to find out exactly what was the view taken by the learned judges who decided it and the grounds on which they proceeded, particularly the latter. There, the facts were that the lessor of the plaintiff, that is Robinson, had demised the premises to the defendant by an agreement dated August 13, 1838, for one year and six months certain from the date of that agreement at the yearly rent of 26*l.* to be paid quarterly, the first quarterly payment to be made on September 29 then next, but the proportion of the rent to be repaid to the tenant; that is to say, he was to make a quarter's payment of rent on September 29 and was to be allowed for the broken half-quarter. It was further agreed that three calendar months' notice should be given on either side previous to the determination of the tenancy. The defendant entered and held under the agreement to the end of the year and six months, and afterwards until the bringing of the action, which was on October 5, 1840. On May 7, 1840, the lessor, that is the landlord, gave the defendant notice to quit on or before August 13 next. That was the anniversary of the day on which the tenancy commenced. Then the notice goes on: "or at the expiration of the current year of your tenancy which

(1) 1 Q. B. 806, 808; 1 G. & D. 218.

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD. Warrington L.J.

shall expire next after the end of three months from and after your being served with this notice." The notice was objected to on the part of the defendant. The judge held it good and the jury under his direction found a verdict for the plaintiff. Then there was a motion for a new trial on the ground of misdirection. The Court of Queen's Bench held that the direction of the learned judge was correct and dismissed the application for a new trial, and refused the rule. If that were a case of holding over from the determination of a fixed term which had expired by effluxion of time it again would be an authority in support of the proposition which the appellant contends for here. But when the case is looked at, and when the judgments of the judges who took part in the decision, and especially that of Patteson J., are considered, I think it is quite plain that what the Court held there was, as in *Berrey* v. *Lindley* (1), that it was really a tenancy from year to year from the first. Lord Denman says simply this without any reasons whatever: "I am of opinion that the three months' notice must be calculated with reference to the original commencement of the tenancy." I am reading from the Queen's Bench Report. Patteson J. does say a little more but not much. He says: "In all cases the 'current year' refers to the time of entry, unless the parties stipulate to the contrary. Here, therefore, the current year would end on August 13th." I pause there for one moment. The expression "current year" which is placed by the reporter in inverted commas is found not in the agreement for tenancy but in the notice to quit, and it is a little difficult to see why Patteson J. refers to it; but however there it is.

He then goes on to say, and this is what seems to me to be the important part of his judgment as throwing light on what it really means: "It may be that, on this construction, the 'six months certain' will have no meaning; but if parties will express themselves so vaguely we cannot help the consequences." Now, if the judge had been of opinion that this was a case of holding over after the determination by effluxion of time of a fixed period of a year and six months he would

(1) 3 Man. & G. 498.

not have been failing to give effect to the expression "six months certain," and I think what is really meant is: "We are of opinion that this was not for a fixed period with a holding over, but that it was a tenancy from year to year from the beginning with possibly a minimum duration of a year and six months"; and that effect might have been given to the agreement. But the point is, I think, the decision really was that on the true construction and effect of the agreement in the particular case, and having regard in particular to the provisions as to the notice to determine contained in the agreement, this must be regarded, not as a lease for a fixed term followed by a tenancy from year to year implied by law, as upon a holding over, but as a tenancy from year to year from the first, and that Patteson J. did attach considerable importance to the fact that there was in the agreement this provision requiring the three months' notice appears from the reference which he makes to *Doe* v. *Dobell* (1) in the course of the argument in *Doe* v. *Lines*. (2)

So far I have dealt with the only two authorities which are referred to by the text-writers as supporting the proposition that where there is an implied tenancy occasioned by the holding over after the expiration of a fixed term, which does not begin and end at the same period of the year, the tenancy from year to year dates from the anniversary of the commencement and not from the end of the fixed term.

But reliance is also placed on a number of cases to which I have already referred cited by Mr. Cole as supporting the passage: "Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term; and notice to quit should be given accordingly." When you look at those cases they are of this nature; a lease is created we will say by a tenant for life for a term exceeding that for which he had power to create a lease, it expires by the death of the tenant for life, and at an odd period of the year. The reversioner does not desire to disturb the tenant,

(1) 1 Q. B. 806. (2) 11 Q. B. 402.

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD. Warrington L.J.

and the tenant pays and the landlord accepts a quarter's payment of the rent in accordance with the provisions of the lease under which the tenant holds. Then it has been held that acceptance of rent by the landlord under those circumstances, unless there is some fact which qualifies its effect, justifies the Court in inferring as a matter of fact that he adopts the tenant as his tenant upon the terms of his original lease, including the period of the year for which that lease is granted. That is to say, that if the original lease was a Michaelmas lease, and the tenant for life dies at some period not being Michaelmas Day it remains a Michaelmas lease. Of course it is a tenancy from year to year only and not for a definite term, but it remains under those circumstances a Michaelmas lease, and would be determinable by notice expiring at Michaelmas. A striking example, not cited by Mr. Cole because it happens to have been decided many years after his book was published, of that state of things is found in *Kelly* v. *Patterrson*. (1) The decision was founded on the same principle which I have just been mentioning. I need not go through it in detail, but the facts as stated in the headnote were these: "Premises were let by the owner in fee on a lease expiring at Midsummer, 1866. The lessee underlet to the defendant on a lease from year to year commencing at Michaelmas." The defendant, therefore, the underlessee, had a Michaelmas lease. "The defendant was in possession at Midsummer, 1866 (when the lease of his immediate lessor came to an end)." That is to say, his immediate lessor had granted him a Michaelmas lease, one which would only expire at Michaelmas, 1866; he had no power to grant him more than a tenancy which would expire at Midsummer, 1866—"and the owner in fee granted a new lease to the plaintiff as from that time. The defendant, who continued to occupy the premises, paid the plaintiff a sum equal to a quarter's rent on the terms on which he had held the premises, as for rent from Midsummer to Michaelmas, 1866."

Then he went on paying rent at an increased rate, but that was a matter of agreement, and in December, 1873, the

(1) L. R. 9 C. P. 681.

plaintiff gave the defendant six months' notice to quit at Midsummer. The decision of the Court there was that the proper inference to draw from those facts was that the new landlord had accepted and adopted the sitting tenant as his tenant and upon the terms under which he was holding, which gave him a right to have his lease determined at Michaelmas and not at Midsummer. That is all—the proper inference to draw from the facts was that the tenant had been adopted on the old terms.

I think I have really said all that is necessary to say for the purpose of showing that there is no rule of law which prevents us from coming to the conclusion as to the true effect of what has taken place in the present case, to which, as I have already said, I think the Court ought to have arrived. But there are one or two authorities which I think support the view which I have been expressing because they show this, that the Courts try to hold that where in the case of an ordinary yearly tenancy the rent is payable quarterly on the ordinary quarter days, that yearly tenancy shall begin and end on one of those regular quarter days. There are many examples of that. The best, I think, and one of the earliest, is *Doe* v. *Johnson* (1), which has been discussed a good deal before us. A man goes into possession at an odd time, he pays rent for the odd time up to the next quarter day, and thereafter he pays and the landlord accepts rent at the regular quarter days. The Court under those circumstances comes to the conclusion, as it is bound to do, that there is a tenancy from year to year. But it holds, and if I may say so with all respect, quite in accordance with common sense, that the tenancy from year to year does not begin at the odd time but at the first regular quarter day succeeding that odd time, and then goes on regularly as a tenancy from year to year, determinable of course as such tenancies are at the end of each succeeding year, being the regular quarter day, and not the odd date as from which the tenant originally took possession. There are a number of those cases, I need not go through them, which have been cited to us. With reference to that part of the case I must

(1) 6 Esp. 10.

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD Duke L.J.

also refer to *Sidebotham* v. *Holland* (1) because a great deal has been said about it in the argument for the appellant. That was a case of a tenancy from year to year, and the question arose whether it began on May 19 or on the succeeding regular quarter day—namely, June 24—and it was held that it began on May 19. But when one looks at it the reason why the Court came to that conclusion was that the tenancy there was created by a written agreement, and that the terms of the written agreement prevented them from arriving at any other conclusion than that it began, as the agreement provided, on May 19. But I think it is clear if you look at the opening words of Lindley L.J.'s judgment that if it had not been for the terms of the agreement the principle of the cases such as *Doe* v. *Johnson* (2) might have been applicable to that case, but that those cases were excluded by the fact that there was an express stipulation excluding their application.

There is only one other matter on which I must say a word. The statement in the text-books to which I have referred has appeared now in well-known books for a good many years, and it is suggested that we ought not lightly to express an opinion contrary to the view thereby expressed. In my judgment, in this particular case, there is no such objection to the judgment we are pronouncing. It is not a case in which numbers of titles depend upon the law as expressed in the text-books. It may be that the result is that a few notices to quit may have been given and accepted as valid which were not valid, or that a few notices to quit may have been treated as invalid by reason of the statement in the text-books. But that is the utmost of what will have happened, and under these circumstances I think we are perfectly free to express our own view, and I think for the reasons that I have stated that the yearly tenancy in this case began and ended at Christmas and was duly determined by a notice to quit expiring at Christmas, and that therefore this appeal fails and must be dismissed.

DUKE L.J. I am of the same opinion. I should add

(1) [1895] 1 Q. B. 378. (2) 6 Esp. 10.

nothing to what has been said by Warrington L.J. if it were not that the conclusion at which the Court has arrived is in contradiction to passages laid down in text-books which have been regarded as works of authority, and, as is said on the part of the appellant, may well be deemed to have been acted upon by large numbers of persons. For my part I think the rule of law applicable to this case is clear beyond argument if you consider the true nature of the case; and it is, I think, to be regretted that attempts should be made to complicate the simple relations of every-day life, such as those of landlord and tenant under a tenancy from year to year, by treating as arbitrary general rules decisions made in particular cases upon exceptional circumstances. The law of landlord and tenant happily is well settled in this country; and I deem it to have been settled upon the terms of the agreement here beyond all question. If the controversy in this case had been what was the effect of the agreement between the parties here it would have been sufficient to say that the agreement between the parties clearly had not the effect which is alleged on behalf of the landlord. The term which was created by the agreement was a term certain, it was not a term from year to year, and it lacked some of the necessary ingredients in any written agreement for a term from year to year. In particular it did not provide for any term of notice. The agreement was for letting for a broken period in the Christmas quarter of 1915 and for the year 1916 down to Christmas; and it was provided that the broken period should be paid for as a half quarter and that subsequent to that there should be a quarterly rent. Now in my opinion the conclusion, and I think the irresistible conclusion, from those facts, when the authorities are taken into consideration, is that that was a tenancy which so far as it could be regarded as the beginning of a tenancy from year to year must be regarded as the beginning of a tenancy from year to year as from Christmas, 1915.

That was the obvious convenience of the case. The quarterly rent ran from that period as a quarterly rent and the tenancy was to determine at a period which coincided with that period; so, so far as the elements of a tenancy from year to year were

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD. Duke L.J.

in question at all, you had determination of the year's tenancy at Christmas, and you had facts entirely consistent, and in my opinion only consistent, with the commencement of the year's tenancy at Christmas. Upon the construction of the agreement it appears to me the tenant would have been clearly right, and the attempt to treat him as a tenant who had come in upon a yearly tenancy in the middle of a quarter would have been a mere piece of vexation. But the conduct of the landlord is relieved of that character in this case because he has the warrant of text-writers for the view he took of the result of the transaction.

Now what is contended for is that where you have a tenancy for a term certain, with holding over, and the payment of quarterly rent, there is an inflexible rule of law that the tenancy from year to year which is inferred from the occupation and the payment and receipt of the yearly rent shall be deemed to have commenced at the commencement of the term certain. If the law of this country had been decided in that sense it certainly would have been contrary to all the settled habits of the people, but it must have been put up with or got over by some means. To my mind the proposition is wrong in principle. There is a very interesting statement in Preston on Conveyancing in that part of the treatise which deals with merger, which explains, in what I think is a very lucid and scientific fashion, the process of reasoning by which you arrive at the conclusion that a term which arose under an express agreement, and a subsequent term following it which arose by conduct of the parties, may be deemed to be merged in one term. I refer to a passage in vol. iii. of Preston on Conveyancing which begins at p. 76, and as a matter of instruction can be pursued with interest to p. 83. It begins so far as appears to be of interest in this case with some observations on the applicability of the doctrine of merger to legal entities which differ in their essence. Preston says this on the subject: "The law considers the lease, that is a lease from year to year, which arises by the continued conduct of the parties, with a view to the time which has elapsed as arising from an estate for all that time, including the current

year, and with a view to the time to come, as a lease from year to year." He treats it as of the essence of the matter that the whole occupation shall have been in a tenancy which had the characteristics of a tenancy from year to year. If you apply to the various cases in which this matter has been considered the governing consideration that what was being dealt with was a tenancy from year to year, the supposed difficulty in dealing with the authorities entirely disappears. I think the principle of the decisions is that in the absence of express agreement to the contrary, a tenancy from year to year is to be determined at the end of a year of the tenancy. That seems to me to have been laid down virtually in every case in which the matter has been discussed, so far as the cases have been brought to the attention of the Court, and not less in the cases on which the appellant relies than in the general body of the cases which are almost innumerable. That was the principle laid down by Lord Mansfield and Buller J. and the other judges of the Court of K. B. in Lord Mansfield's time. It is intelligible and I think everybody has acted upon it. Now three cases were cited here as cases to the contrary. Every one of them was a case in which there had been a tenancy with all the characteristics of tenancy from year to year before the period of holding over; and when the learned judges there said the tenancy which was determined must be deemed to have begun "at the commencement of the tenancy," they were referring I think quite clearly to the commencement of the tenancy from year to year. The cases which laid down the general principle, and which I think were all referred to here, following upon *Right* v. *Darby* (1), began with *Doe* v. *Johnson* (2), where Lord Ellenborough made the matter perfectly clear, and in language which might have prevented the possibility of misunderstanding under such facts as are found in this case. He said this, as a matter of common knowledge—he cited no authority for it, nobody thought of considering the matter as one which required any authority —"if the tenant comes in in the middle of a quarter, and he afterwards pays his rent for that half quarter, and continues

(1) 1 T. R. 159. (2) 6 Esp. 10.

C. A. 1919 CROFT v. WILLIAM F. BLAY, LD. Duke L.J.

then to pay from the commencement of a succeeding quarter, he is not a tenant from the time of his coming in, but from the succeeding quarter day." Of course he was a tenant from the time of his coming in in a sense, but Lord Ellenborough, speaking of him as tenant from year to year at common law, makes it clear that he was not tenant from year to year from the time of his coming in, but from the time of the succeeding quarter. That same principle was illustrated in *Doe* v. *Stapleton* (1) before Park J., who founded himself on the passage in *Doe* v. *Johnson* (2); and observed in that case that the tenant never supposed that the tenancy was to begin from the half quarter. *Doe* v. *Grafton* (3) is a case very similar in its material circumstances to the present case. The actual tenancy had begun on April 19. A sum of rent had been paid for the period from April 19 to the quarter day. When the question of notice to quit arose it was held that the tenancy excluded the broken period —a simple and intelligible decision, which it is sought now to disturb by leaving the parties to be bound as a matter of law by a supposed principle which has no foundation in reason. The text-books in which error has sprung up by the extraction from exceptional cases of an arbitrary general rule have been fully dealt with by my Lord, and I do not propose to add anything to what has been said by him. As I stated at the outset of my remarks the case seems to me in principle to be one of no difficulty, and only to be complicated by a misunderstanding of one or two decisions which were erroneously supposed to have laid down a rule of law. I think the appeal fails.

EVE J. There is no dispute of fact in this case, and my Lords have dealt so adequately with the legal results brought about by the relations of the parties that I only propose to add a few observations of my own. Accepting Mr. Chubb's contention that the effect of the agreement of November 15 was to create a tenancy for a fixed term of one year and one-eighth of another year, that is to say for a term of which the dates

(1) 3 C. & P. 275. (2) 6 Esp. 10.
(3) 18 Q. B. 496.

of commencement and determination were not coincident, the first question that arises is, what was the effect of the payment and acceptance of rent on March 25 following upon December, 1916? Now admittedly that created a tenancy from year to year, and the next and important question is, as from what date. The only reported case to which our attention has been drawn in which a similar state of circumstances existed is that of *Doe* v. *Lines*. (1) There it was held that the tenancy from year to year commenced from the date of the expiration of the previous lease. By what I think is a somewhat inverse process of reasoning it is said that that case is an exception to the rule traceable to and to be accounted for by the fact that the sitting tenant was not the lessee who originally entered, but an assignee. But there is no trace as far as I can see in the arguments, or in the judgment, of anything which leads to the conclusion that the case was treated as exceptional on that ground, and the attitude which is taken on behalf of the appellant in dealing with that case presupposes the existence of the rule as stated in the text-books which have been referred to. I do not propose to go through the cases or to restate the reasons fully and adequately stated by my Lords why we have come to the conclusion that no such rule exists. When once the existence of the rule is disproved the assertion that *Doe* v. *Lines* (1) is an exception to that the rule of course falls with it. I think this case comes within the principle of *Doe* v. *Lines* (1), and we are, as it seems to me, happily constrained to hold that the existence of the state of things which Mr. Chubb contends existed here resulted in a tenancy from year to year, following on the holding over by the respondent and commencing from the expiration of the tenancy agreement and not from the date of its commencement. I agree therefore in thinking that the appeal should be dismissed.

Appeal dismissed.

Solicitors: *H. M. R. Pothecary, for Drummonds, Croydon; E. S. Trehearne.*

(1) 11 Q. B. 402.

G. A. S.

C. A.
1919
June 19, 20.

In re CAIN'S SETTLEMENT.

CAIN *v.* CAIN.

Settlement—Construction—Settlement of Shares in Trading Company—Dividends received by Trustees after Deduction of Income Tax—Trust after Death of Settlor's Son to pay Income up to 2000l. per annum to his Widow for Life—Balance of unapplied Income to be accumulated in Trust for Children—Right of Trustees to deduct Income Tax from Widow's Annuity.

By a settlement shares in a trading company to the nominal value of 100,000*l.*, bearing interest at 4 per cent., were settled upon trust to pay the dividends and annual income arising therefrom to H. C. for his life, and after his death, if he should leave two or more children surviving him, to pay the income to the extent of, but not exceeding, 2000*l.* per annum to his widow during her life or widowhood, provided that she should provide for, educate and bring up the children during minority. The settlement also provided that any unapplied balance of the income should be accumulated and held upon trust, to divide the same equally among the children. H. C. died on November 4, 1905, leaving a widow and two children him surviving. The trustees received the dividends on the shares less income tax, which was deducted by the company before payment, and in paying the annual sum of 2000*l.* to the widow the trustees deducted income tax therefrom:—

Held, by the Court of Appeal, affirming the decision of the Lancaster Palatine Court, that the trustees had acted on a right principle, and that the widow's annuity of 2000*l.* was properly subject to the deduction of income tax.

Ashton Gas Co. v. *Attorney-General* [1906] A. C. 10 applied.

Brooke v. *Price* [1917] A. C. 115 distinguished.

Appeal from a decision of the Deputy Vice-Chancellor of the County Palatine of Lancaster.

By a settlement dated February 2, 1903, and made between Robert Cain of the first part Hubert Cain of the second part and the said Robert Cain and the plaintiffs of the third part certain shares in a brewery company called Robert Cain and Sons, Ld., to the value of 100,000*l.*, which had been transferred by the said Robert Cain into the joint names of himself and the plaintiffs, were settled upon trust to pay the dividends and annual income arising therefrom to Hubert Cain during his life, and after his decease if there should be two or more children of the said Hubert Cain surviving him, to pay the

income to the extent of but not exceeding 2000*l.* per annum to his widow (if any) during her life so long as she should remain his widow, provided that she should provide for educate and bring up the children of the said Hubert Cain during their respective minorities. And in case there should be only one child surviving him in trust to pay the income to the extent of 1500*l.* per annum to the widow with a similar provision as to the bringing up and education of such one child. And in case there should be no child surviving him then in case of the failure of such children to attain a vested interest under the trusts thereinafter contained and from and after such failure the said trusts premises should be held in trust to pay the income to the extent of 600*l.* per annum to the widow during her life or widowhood. Provided that if any child of Hubert Cain should attain a vested interest as aforesaid then the widow should thenceforth during her life or widowhood be entitled to her income of 1500*l.*, and if two of such children should attain vested interests then she should be entitled to her income of 2000*l.* subject always to the obligation of providing for educating and bringing up the children under age. And it was thereby agreed and declared that during any period when there should be an unapplied balance of the said income the same should be accumulated and added to the funds from which the same should have arisen and subject to the trusts thereinbefore contained for the benefit of the widow the trust premises should be held upon trust to divide the same unto and equally between all the children if more than one who being sons or a son should attain the age of 21 years or being daughters or a daughter should attain that age or marry under that age.

The settlement further provided that it should be lawful for Robert Cain by deed or will to revoke the settlement or any of the trusts thereof.

Robert Cain died on July 19, 1907, having by his will, dated in 1905, confirmed the settlement.

Hubert Cain died on November 4, 1905, leaving him surviving his widow, Marian Cain, and two children only—namely, Eira Frances Cain and Freda Mary Cain, an infant.

C. A. 1919 — CAIN'S SETTLEMENT, *In re.* CAIN *v.* CAIN.

Eira Frances Cain in January, 1916, intermarried with Major Cecil William Smeed, and there was one child of the marriage, Cecil Guerney Smeed, born in 1918.

The settled funds consisted of 32,500*l.* First Preference shares of 1*l.* each and 67,500*l.* Second Preference shares of 1*l.* each in Robert Cain & Sons, Ld. Since the death of Robert Cain these shares had borne interest at 4 per cent., resulting in a gross income of 4000*l.* per annum, from which income tax was deducted at the source, the net amount after such deduction having been received by the plaintiffs, the trustees.

As from the death of Robert Cain the plaintiffs had paid to the widow the sum of 2000*l.* per annum less income tax thereon, and had accumulated the balance of the net income in accordance with the provisions of the settlement, the question having arisen whether, upon the true construction of the settlement and in the events which had happened, the widow was entitled to receive the income of the funds subject to the trusts of the settlement to the extent of 2000*l.* per annum without any deduction for income tax, she presented a petition for the determination of that question. The respondents to the petition were the plaintiffs, the trustees, Eira Frances Smeed, Freda Mary Cain and Cecil Guerney Smeed (an infant).

The Deputy Vice-Chancellor held that on the true construction of the settlement the "dividends and annual income" or the "income" of the shares meant the gross amount of the dividends declared on the shares, and not the amount of the dividends less income tax, and that, having regard to the provisions of the Income Tax Act, 1842, ss. 40, 54 and 102, and the Income Tax Act, 1853, s. 40, not only was it the duty of the company to deduct the tax from the dividends before paying them to the trustees, but also it was the duty of the trustees to make a proportionate deduction from the 2000*l.* payable out of the dividends from which the tax had been deducted.

The widow appealed.

Hon. F. Russell K.C. and *Manning* for the appellant. This

settlement provides for the division of a fund of income which has already borne tax. What has to be dealt with is a tax free fund. As in *Brooke* v. *Price* (1) the settlement should take effect according to its terms, unaffected by ss. 102 and 103 of the Income Tax Act, 1842. Those sections are merely machinery and do not affect the rights inter se of the parties to a settlement like this. A contractual division of net income does not give rise to a further deduction of income tax.

The provision for the appellant is not an annuity charged upon gross income as the Vice-Chancellor has held it to be. It is a gift of the entirety of the net income up to 2000*l.* a year, coupled with a provision that after the 2000*l.* has been reached the balance of the income shall be accumulated.

Maugham K.C. and *Glover* for Freda Mary Cain. It is erroneous to treat this as a dealing with a tax free fund. *Brooke* v. *Price* (1) was quite a different case. This is the ordinary case of trustees holding securities upon trust to pay out of the income thereof an annuity: *In re Loveless.* (2)

[WARRINGTON L.J. In *Brooke* v. *Price* (1) it is clear that what was being dealt with was a tax free fund.]

Yes, and that is not so here. What is payable to the widow is an annuity or annual payment within s. 102 of the Income Tax Act, 1842, and the recipient must bear the tax.

Courthope Wilson K.C. and *Macmaster* for Mrs. Smeed and her child.

This case is governed by *Attorney-General* v. *Ashton Gas Co.* (3)

In *Brooke* v. *Price* (1) there was a special bargain which distinguishes that case from the present. Here there is an ordinary trust for the payment of an annuity to the widow, and she is only entitled to a net sum after deduction of income tax.

H. E. Gardner for the trustees.

Hon. F. Russell K.C. in reply. It may be admitted that this case is not on all fours with *Brooke* v. *Price* (1), but I use it to show that this is a tax free fund. The present case comes within the fourth class stated by Lord Finlay. (4)

(1) [1917] A. C. 115.
(2) [1918] 2 Ch. 1.
(3) [1904] 2 Ch. 621; [1906] A. C. 10.
(4) [1917] A. C. 121.

C. A. 1919 — CAIN'S SETTLEMENT, *In re.* CAIN *v.* CAIN.

Attorney-General v. *Ashton Gas Co.* (1) has no application here. This case is not within s. 102 of the Income Tax Act, 1842, nor s. 40 of the Act of 1853, because the trustees are not liable to pay the tax. On the construction of this deed out of whatever comes to the hands of the trustees in the shape of income from which tax has been deducted they are to pay the widow 2000*l.* a year. *In re Loveless* (2) was a clear case of an annuity charged upon income. When there is a fund of income in respect of which all the claims of the Revenue have been satisfied any arrangement with regard to it may be made by the parties: *Brooke* v. *Price.* (3) The parties to the settlement contemplated that the widow should receive a fixed annual sum for providing for herself and the children. The fund reaching the hands of the trustees is free of tax, and it is to be apportioned in the manner specified.

WARRINGTON L.J. This is an appeal from an Order of the Deputy Vice-Chancellor (now the Vice-Chancellor) of the County Palatine of Lancaster. The question to be determined is whether the appellant Marian Cain, is, according to the true construction and effect of a settlement dated February 2, 1903, entitled to receive a clear sum of 2000*l.* out of the income of the trust funds without any deduction for income tax. The Deputy Vice-Chancellor has held that she is not so entitled, but that she is only entitled to receive the 2000*l.* after deduction of the tax.

The deed in question was a settlement by way of family compromise and arrangement. The subject-matter of the settlement consisted of shares in a company in which the various members of the family were interested. The shares were of the nominal value of 100,000*l.*, and they bore a dividend of 4 per cent., but no dividend was payable in respect of them until the death of Robert Cain, one of the settlors. The deed was made between Robert Cain of the first part, his son Hubert Cain of the second part, and Robert Cain himself and two other gentlemen of the name of Cain, of the third

(1) [1904] 2 Ch. 621; [1906] A. C. 10. (2) [1918] 2 Ch. 1.
(3) [1917] A. C. 115.

part, as trustees. Before the execution of the deed the shares which I have mentioned had been transferred into the name of the trustees. The deed witnesses, after recitals to the effect of the facts to which I have referred, that Robert Cain and Hubert Cain covenant with the others that the deed should be carried into full effect "and doth hereby ratify and confirm and agree to accept in final settlement of all outstanding questions between the parties the arrangement and settlement hereby made and provided for." Then it provides this: "And it is hereby declared and agreed that the trustees"—reading it shortly—should stand possessed of the shares upon trust to pay the dividends and annual income arising therefrom, unto Hubert Cain during his life or until he should become bankrupt, or assign—I need not read all that. It is a protected life interest. Then on that event happening there was a provision for the payment or application of the income of the fund during the life of Hubert Cain by paying over the whole or any portion thereof to his wife for the maintenance of her children and for the accumulation of the residue. Then comes the material trust. [The Lord Justice read it and continued:] Robert Cain died on July 19, 1907. Hubert Cain died in Robert's lifetime, and from the death of Robert Cain dividends at the rate of 4 per cent. per annum have been declared on the shares, and these dividends, less of course income tax, which is deducted at the source, that is to say, deducted by the company before paying the dividends to the trustees, have been received by the trustees. Out of that income they have paid to Mrs. Marian Cain, the widow of Hubert Cain, 2000*l.* less the proper income tax on that sum, and they have accumulated the balance of the income in their hands. It is now said that the trustees are wrong in what they have done, and that they ought in the past to have paid to Mrs. Marian Cain the sum of 2000*l.*, and that they ought in the future to pay her the full sum of 2000*l.*, leaving the income tax on the entire 4000*l.* to fall exclusively upon the fund directed to be accumulated. Whether that contention is right is the question we have to determine. The case is put in this way: it is said, and I

C. A. 1919

CAIN'S SETTLEMENT, *In re.* CAIN *v.* CAIN.

Warrington L.J.

think truly, that it really depends upon the true construction of the deed of 1903. Does that deed provide for the payment by the trustees to Marian Cain of the income tax on her annuity as well as the annuity itself? First, in describing the income that the trustees are to deal with, it is called the "dividends and annual income arising from the trust fund." That is what they are to pay to Hubert Cain. Then, whenever the income is afterwards referred to, the word "dividends" is left out. But it seems to me that that is quite immaterial; the income throughout which is dealt with by the settlement consists of the dividends, interest, or income derived from the trust fund in whatever state it may happen to be invested. Then it is contended that all that the trustees have to deal with under this settlement is the income of the fund which actually comes to their hands; that is to say, the amount which is paid to them, or paid to their banking account every year by the company; in other words, the amount of the dividends derived from those shares, less the income tax which has been deducted at the source by the company. In my opinion, that is not the true construction of a settlement of this kind. I think that, having regard to the provisions of the Income Tax Acts, particularly as explained in *Ashton Gas Co.* v. *Attorney-General* (1), and especially by Buckley J., as he then was, in the same case (2) the income tax forms part of the income, and when a settlement or a will is dealing with the income of a trust fund, and directing the trustees to apply that income, the income which is meant is the income including the income tax, and not the income as a tax free fund, although the tax may have been deducted at the source. The reason, as pointed out in *Attorney-General* v. *Ashton Gas Co.* (1), is this: that the payment at the source is nothing more, under the Income Tax Acts, than the machinery by which the Revenue collects the tax from the person ultimately liable to pay. In the case of a company it pays income tax on its own gains and profits, and under the provisions of the Income Tax Acts it collects from the individual shareholders the amount of the income tax

(1) [1906] A. C. 10. (2) [1904] 2 Ch. 621, 623.

on their shares. It is nothing more than that. But the income tax is the tax on the income of the person who is the ultimate recipient of the gains and profits, and not upon the person who, although liable to the tax, has to pass on those gains and profits to somebody else. I need not go through the sections; they have often been discussed. They have been discussed in this Court half-a-dozen times during the last sittings. But that is the effect of them, the tax is a tax on the ultimate recipient, and not upon the person through whose hands the income passes, and who is assessed to the tax for the convenience of the Revenue in the matter of collection. If that be so, it seems to me it would be an extremely dangerous precedent to treat an ordinary deed such as this is (there is nothing peculiar about it) as a deed which deals, in declaring the trusts of income, with income as a tax free fund. With all respect to the argument which has been addressed to us, I think that the trustees in point of law receive and deal, not with the income from which tax has already been deducted, but the entire income, including the income tax. I deduce that from a perfectly well-known direction in the Income Tax Act, that where a person is liable to pay, out of gains and profits, to somebody else, some portion of those gains and profits, and deducts the income tax, that is to be treated as a payment to the person entitled to receive a proportion of those gains and profits. I think therefore that the income which the trustees are directed to deal with is the income of the fund without reference to income tax at all.

If that is so, what is the real meaning of the direction to the trustees to pay the income to the extent of but not exceeding 2000*l.* per annum to Marian Cain, and the subsequent direction to accumulate the unapplied balance, if any, of the said income? It is said, on the one hand, that the direction is to take every item of money which comes into the hands of the trustees, and pay that over to Marian Cain until she has received 2000*l.*, then to accumulate the other amounts. In my opinion, that is not the meaning of it. These words, in my view, do nothing more than direct the payment of a proportionate part of the income of the

C. A. 1919 — CAIN'S SETTLEMENT, *In re.* — CAIN *v.* CAIN. — Warrington L.J.

funds to this lady ; and that, having regard to the provisions of the Income Tax Acts, is equivalent to a direction to pay an annuity charged upon the entire income. I may mention, with regard to that, that the expression "charged upon" is used, in my view of the Income Tax Acts, not in the technical sense that you have to find an actual charge, but in a more popular sense, as a burden upon the income out of which it is paid. It seems to me that it makes no difference whether the annuity is paid as part of a fund, or whether it is paid as a charge on the fund, it is an annuity which the trustees are liable to pay. They are paying it out of a fund from which deduction has been made, and under the express direction of s. 102 of the Act, 1842, in such a case as that, they are entitled to deduct the proportionate part of the tax they have so paid from the person ultimately entitled to receive that annual payment.

I will just say a word about *Brooke* v. *Price* (1), which was relied upon for the appellant. That was a very peculiar case. A lady was entitled to considerable income under her father's will. She had been divorced by her husband, and it was necessary that some provision should be made out of her income, and she entered into a covenant to pay her husband (I am treating it very simply for the present purpose) an annual sum out of the net income received from her father's trustees, after the deduction of income tax. That is to say that the fund with which she was there dealing was the net fund after all the obligations to the Revenue had been fulfilled, and the covenant merely provided for the division of that fund in certain proportions. There the covenantor said in terms that the proportion which the husband was to receive was so much without deduction of income tax. It was held in this Court and in the House of Lords to be upon the true construction of the deed a provision under which the husband was entitled to receive the annual sum of money without deduction of the tax, and further, that there was nothing in the Income Tax Acts rendering such a provision void or illegal, partly because the tax payable to the

(1) [1917] A. C. 115.

Government had already been paid, and they were dealing with the fund less the amount of the tax. I ought perhaps to have mentioned before, when I was dealing with the construction of the deed, that there are some expressions to the effect that the parties were providing this income as an income for the lady, and for the purpose of enabling her to maintain the children; but I am afraid there are many cases in which testators or settlors have provided funds for such purposes and have not thought of the income tax, or, at any rate, have not contemplated the great increase in the income tax which has taken place in recent years, and therefore have not made such provision as they might otherwise have made for the particular purpose. I am afraid that that is a matter which cannot be considered; it throws no light on the construction of the deed, and on the true construction of the deed I think the widow is entitled to an annual sum out of this income amounting to 2000*l.*, but that that annual sum includes the income tax on it, and she is therefore liable for the proportionate part of the tax. I think that the judgment of the Deputy Vice-Chancellor was right, and that the appeal ought to be dismissed.

DUKE L.J. I agree. I do not know that it is necessary to add anything to what has been said by the lucid judgment of the learned Deputy Vice-Chancellor, nor to the exposition of the case which has been made by the President of the Court; but the argument has been an exceedingly interesting one, and the case is one which might affect a large number of settlements. Prima facie, the provisions in favour of the appellant here are within the clear language of s. 102 of the Income Tax Act of 1842 and s. 40 of the Act of 1853, and the trustees were entitled to make the payment of income tax which was imposed in respect of the income of the appellant, and to debit that payment to the appellant. The principle upon which that process is pursued is enjoined by the Legislature, and is in practice pursued as illustrated in *In re Loveless.* (1) But it is said here that, although prima facie the tax must

(1) [1918] 2 Ch. 1.

C. A. 1919

CAIN'S SETTLEMENT, *In re.* CAIN *v.* CAIN

Duke L.J.

be borne by the annuitant yet it is competent for a settlor to create an exception within the provisions of the Income Tax Acts, and without any wrong to the Exchequer, by the use of proper language to provide that income tax upon the yearly payment of an annuity for which provision is made, shall be discharged by those through whose hands the fund passes, and by whom the payment is directed to be made. No doubt that is true. Mr. Russell relied upon the argument in *Brooke* v. *Price* (1) and claimed to bring the case within the fourth class of possible cases to which Lord Finlay there referred; a fixed sum payable out of the net balance of income after deduction of income tax on the whole. At a time when income tax is 6*s.* in the *l.*, and there is a limited income for domestic purposes such as those which are contemplated by this settlement, there is an unconscious, perhaps a conscious, desire to ease, as far as possible, the burden of a recipient of income. I followed with the utmost possible care the observations Mr. Russell made upon the various modes of expression in the settlement, and the various notions which are indicated by the phraseology of the settlement, but I have come to the conclusion that it is impossible to say that the settlor here has expressed any intention that the burden of the income tax on the whole of the fund which is here in question should be cast upon the residue after the deduction of a net amount. I think it is an impossible construction of the settlement. The learned Deputy Vice-Chancellor took that view. I agree entirely with the reasons of his judgment, and I do not propose to say anything more than that on those grounds it seems to me this appeal inevitably fails.

EVE J. Notwithstanding the ingenious argument which has been addressed to us on behalf of the appellant, I think the construction of this deed is fairly easy. The subject-matter of the settlement was an investment of 100,000*l.* Of the income of that fund, subject to certain limitations to which I will refer in a moment or two, the husband, Hubert

(1) [1917] A. C. 115.

Cain, and his widow are constituted successive life tenants. Pausing there, it would I think be impossible to fix any construction on the deed which would not make them life tenants of the whole income, that is to say the income after the deduction of income tax.

But upon the life interest of the widow a limitation is imposed according to the state of the family of Hubert Cain for the time being. If there be no child of his living the widow's interest in the income is limited to 600*l.* a year. If there be one child it is increased to 1500*l.* a year, and if there be two or more children it is further increased to 2000*l.* a year. Mr. Russell says that upon the true construction of the deed those reduced amounts are not subjected to the obligations or the burdens to which the whole income, if the widow were in receipt of the whole income, would, as I think, according to the true construction of the deed, undoubtedly be subject. The question is whether we can find in the terms in which those limitations are imposed on the widow's life interest any indication or any provision which frees those reduced amounts from the obligations which would attach to the larger amount. In my opinion it is quite impossible to extract from the expressions on which so much reliance has been placed, and to which I need not again refer, any intention on the part of the settlor to place the widow in a more favoured position with regard to those obligations and burdens if she be receiving less than the whole income, than she would be under were she in receipt of the whole of the income.

For those reasons I think it is impossible to say that the judgment of the learned Deputy Vice-Chancellor was anything but right.

Appeal dismissed.

Solicitors : *Nash, Field & Co., for Reynolds & Co., Birmingham ; Oliver Jones, Billson & Co., Liverpool ; Rutherfords, Liverpool ; Blanco White.*

SARGANT J.

1919

Mar. 26; *Apr.* 4.

In re COPE AND WADLAND'S CONTRACT.

[1918. C. 2028.]

Settled Land—Tenant for Life—Disentailing Deed and Resettlement—Power of Tenant for Life to sell under original Settlement—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 2 (*sub-s.* 4), 20, 50.

Where there has been a settlement of land on a tenant for life and a tenant in tail in remainder, and they have concurred in executing a disentailing assurance, conveying their estates to a grantee to uses, and limiting to themselves a joint power of appointment, and limiting the settled land, in default of appointment, to the use of the tenant for life in restoration of his former life estate and of the powers annexed thereto, with remainder over, the tenant for life can sell the land under the Settled Land Acts and make title thereto as tenant for life under the original settlement, and can require the purchase money to be paid to the persons appointed by the original instrument of settlement to be the trustees of the settlement thereby made for the purposes of those Acts; and it is not necessary for the trustees of the compound settlement, consisting of the original settlement and the disentailing assurance, to be appointed. This is the case, notwithstanding the judgment of the Court of Appeal, in *In re Constable's Settled Estates* [1919] 1 Ch. 178, that words in a deed purporting to restore a life estate thereby or previously parted with are themselves ineffectual actually to give back to the tenant for life the very same estate he originally had.

Inasmuch as, under s. 50 of the Settled Land Act, 1882, the powers under that Act of a tenant for life are not capable of assignment or release, and remain exercisable by him notwithstanding any assignment of his life estate, it follows that in the above case the original "settlement" (as defined in that Act) is not brought to an end by the tenant for life so conveying away his life estate, but continues to subsist so long as the powers given by the Act to the tenant for life under that settlement remain exercisable, notwithstanding that no portion charged under that settlement may remain to be raised and no rent-charge thereby created continues payable:—

In re Mundy and Roper's Contract [1899] 1 Ch. 275, 296; *In re Constable's Settled Estates* [1919] 1 Ch. 178, 192; *In re Du Cane and Nettlefold's Contract* [1898] 2 Ch. 96; and *In re Lord Wimborne and Browne's Contract* [1904] 1 Ch. 537, followed.

By his will dated December 4, 1891, the Rev. Sir William Henry Cope devised (inter alia) a freehold farm called Bufield in the parish of Tysoe in the county of Warwick to his son Antony Cope for life, with remainder to the first and other sons successively of his said son Antony Cope in tail male.

The testator died on January 7, 1892. The present trustees of his will, who were also trustees thereof for the purposes of the Settled Land Acts, 1882 to 1890, were the said Antony Cope, Antony William Cope and Mordaunt Cope. By a disentailing deed dated July 7, 1895, and made between the said Antony Cope (now Sir Antony Cope) of the first part, Denzil Cope (the eldest son of Sir Antony Cope) of the second part, and Sir Antony Cope, Edward Fryer and Richard Powles (below called " the trustees ") of the third part, the said farm (inter alia) was granted to the trustees to hold the same unto the trustees and their heirs, freed from the said tail male in Denzil Cope, to such uses as Sir Antony Cope and Denzil Cope should by deed or deeds, revocable or irrevocable, jointly appoint, and, in default of such appointment, to the use of Sir Antony Cope for life in restoration, continuation and confirmation of the estate for life limited to him by the said will, with the powers annexed to such life estate, with remainder to the use of Denzil Cope in tail male, with remainder over; and the trustees were appointed trustees of the settlement thereby made for the purposes of the Settled Land Acts, 1882 to 1890.

Sir Antony Cope and Denzil Cope had not exercised their joint power of appointment. Sir Antony Cope entered into a contract dated September 19, 1918, for the sale of the farm to Henry Wadland. The purchaser took the objection to the title that, by the disentailing deed, the life estate of the vendor was limited to him in restoration of his life estate under the will, and that he was in as of that estate, but that no other limitations now existed under the will, and accordingly that the will did not constitute a settlement. The purchaser accordingly alleged that (there being no jointure or portions existing under the will) the only settlement which existed was the compound settlement created by the will and the disentailing and resettling deed, and that trustees of this compound settlement must be appointed. By a further requisition the purchaser alleged that the estates in remainder under the will had been destroyed by the disentailing deed, and that the only subsisting estate under the will was the

SARGANT J.
1919
COPE AND WADLAND'S CONTRACT, *In re.*

restored life estate, and that the will was no longer a settlement for want of interests in succession. The vendor replied that the original settlement under the will was still subsisting because the vendor's life estate under it was still subsisting, and also that the disentailing deed did not destroy the estate in tail male taken by Denzil Cope under the will but merely enlarged it. The purchaser thereupon took out an originating summons under the Vendor and Purchaser Act, 1874, to have it declared that a good title to the farm had not been shown.

Carr (*Samuel Green* with him) for the applicant. No settlement now exists under the will. *In re Mundy and Roper's Contract* (1) shows that the life estate under the will had been destroyed by the resettlement; and the restoration of the life estate in the resettlement does not alter this: *In re Constable's Settled Estates.* (2) There are not here, as there were in *In re Lord Wimborne and Browne's Contract* (3), a jointure and portions charged under the powers of the original settlement. It is true that the powers of the tenant for life are by the Settled Land Act, 1882, indestructible, but in order that a sale may be made under the Act, there must be (1.) an effective settlement, and (2.) some person who can exercise the power of the tenant for life: Wolstenholme's Conveyancing and Settled Land Acts, 10th ed., p. 368. In order that there may be an effective settlement there must be land limited by way of succession: *In re Pocock and Prankerd's Contract.*(4)

Bryan Farrer for the respondent. Whether the land being dealt with is settled land or not depends on s. 2, sub-s. (4), of the Settled Land Act, 1882, which must be read with sub-s. (1) of the same section. Sect. 2, sub-s. (4), was taken from s. 2 of the Settled Estates Act, 1877, which was a consolidating Act, and the sub-section re-enacted s. 3 of the Settled Estates Act, 1864. In the Act of 1864 the definition contained in the Settled Estates Act, 1856,

(1) [1899] 1 Ch. 275.
(2) [1919] 1 Ch. 178.
(3) [1904] 1 Ch. 537.
(4) [1896] 1 Ch. 302.

was amended because of *In re Birtle's Settled Estates* (1), in which it had been decided that the settlement must be regarded as at the date of the application to the Court and not as at the date of the instrument taking effect. It is clear therefore that the Legislature, in adopting the language of the Act of 1864, intended the Act of 1882 to have the same meaning, although, in the Act of 1882, sub-s. (4) of s. 2 is somewhat in conflict with sub-s. (1) of the same section, which speaks of land standing "for the time being limited" by way of succession. Sub-s. (4), which is thus the governing provision, says that "the determination of the question whether land is settled land, for purposes of this Act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect." The time of the settlement taking effect is, in the case of a will, the death of the testator: *In re Earl of Stamford* (2); *In re Marquis of Ailesbury and Lord Iveagh* (3); *In re Bective Estate.* (4). Having once got land as settled land, the Act applies as long as there is some person capable of exercising the powers of a tenant for life, as is the case here. Before *In re Constable's Settled Estates* (5) in the Court of Appeal it was clear that under *In re Wright's Trustees and Marshall* (6) and *In re Lord Wimborne and Browne's Contract* (7), in a case like the present, the vendor could sell either under the original settlement or under the compound settlement, but not under the resettlement alone. Then in the Court of Appeal in *In re Constable's Settled Estates* (5), it was held that it was a mistake to suppose that the vendor could not sell also under the resettlement. The Master of the Rolls took care to point out in that case, that, although the tenant for life could thus sell under the resettlement, his powers under the original settlement were unaffected. The decision of the Court of Appeal was an enabling and enlarging decision, and was never meant to shake the many titles which have been made by selling under an original settlement. Whenever there is a

(1) (1863) 11 W. R. 739.
(2) [1896] 1 Ch. 288.
(3) [1893] 2 Ch. 345.
(4) (1891) 27 L. R. Ir. 364.
(5) [1919] 1 Ch. 178.
(6) (1884) 28 Ch. D. 93.
(7) [1904] 1 Ch. 537.

SARGANT J.
1919
COPE AND WADLAND'S CONTRACT, *In re.*

settlement at the date of which the land stands limited in succession, and there is a person who is tenant for life or has the powers of a tenant for life by virtue of that settlement, the settled land can be sold just as it could before the decision of the Court of Appeal in *In re Constable's Settled Estates* (1) in the Court of Appeal. The restoration of the life estate left the original settlement existing so as to form a compound settlement with the resettlement: *In re Spearman Settled Estates.* (2)

Cur. adv. vult.

April 4. SARGANT J. In this case the purchaser has contended that the settlement constituted by the will of the late Sir William Henry Cope has come to an end, and accordingly that title cannot be made by the present Sir Antony Cope and the trustees of this will for the purposes of the Settled Land Act. The objection was taken prior to the recent decision of the Court of Appeal in *In re Constable's Settled Estates* (3); but in the argument in support of it reliance has naturally been placed on that decision, and particularly on the view there expressed, that on the resettlement the conveyance by the original tenant for life necessarily prevented the restoration or revival of his former estate, and resulted in his acquiring an estate for life under the resettlement only. It seems to me to be difficult to reconcile this view with the view, also taken in the judgment, that the conveyance by the tenant for life and the contemporaneous conveyance by the tenant in tail are compatible with the restoration of the previous power to appoint in fee simple on a sale, so as to enable a subsequent exercise of the power to overreach the incumbrances affecting the estate of the tenant in tail. But the view as to the extinction of the original estate goes to the root of the decision and I am bound by it.

This, however, does not conclude the matter. It was held in *In re Mundy and Roper's Contract* (4) that, even where on a resettlement there had been no attempt to restore the

(1) [1919] 1 Ch. 178.
(2) [1906] 2 Ch. 502.
(3) [1919] 1 Ch. 178, 192.
(4) [1899] 1 Ch. 275.

original life estate or the original powers, the effect of the statutory indestructibility of the original tenant for life's powers was to enable him still to convey as under the previous settlement. There is no reason why this should not also be the case where, as here, the loss of the life estate under the previous settlement is unintentional, and the decisions in *In re Du Cane and Nettlefold's Contract* (1) and *In re Lord Wimborne and Browne's Contract* (2) are in favour of this view. Further, this is clearly recognized by the following passage in the recent decision of the Court of Appeal (3)—namely, "It is not in dispute that he possesses the statutory powers of a tenant for life under the will. He took an estate for life thereunder, and accordingly still has the powers of a tenant for life, even if he has parted with his life estate." It has been attempted to distinguish this case from all or most of the cases referred to on the ground that these charges, such as jointures and portions, were subsisting under the earlier settlement, while here the only settlement was that consisting of the life tenancy and the remainder. But I do not think that any of the decisions really turn on the existence of these charges, though they are no doubt referred to as an additional element in *In re Lord Wimborne and Browne's Contract.* (2) And I may add that the argument of the purchaser that the land has ceased to be settled land under the will hardly pays sufficient attention to the express provisions of the Settled Land Act, 1882, as to the date for determining the question whether the land is settled land for the purposes of the section: see *In re Marquis of Ailesbury and Lord Iveagh.* (4) It is not immaterial on this point to notice the doubt expressed by the majority of the Court of Appeal in *In re Mundy and Roper's Contract* (5), whether the settlement would be brought to an end and the power gone even if A., the tenant for life, were to surrender his life estate to B., the tenant in remainder. It is clear that they would have held that the prior settlement had not been brought to an end and the power of sale had

(1) [1898] 2 Ch. 96.
(2) [1904] 1 Ch. 537.
(3) [1919] 1 Ch. 178, 192.
(4) [1893] 2 Ch. 345.
(5) [1899] 1 Ch. 275, 296, 297.

SARGANT J. 1919 COPE AND WADLAND'S CONTRACT, *In re.*

not ceased where the transaction was such as that involved in the resettlement here.

On the view here taken it is unnecessary to do more than quite briefly refer to an additional argument on behalf of the vendor founded on *In re Spearman Settled Estates.* (1) That part of the judgment in that case which decided that the old life estate was restored must no doubt be taken as overruled by *In re Constable's Settled Estates* (2), but this does not affect the main decision, which recognized that the father and son, as together absolutely entitled to the full unincumbered inheritance, could make any dispositions they should choose of the estate. Here the father and the son were in the same position as in *In re Spearman Settled Estates* (1), and they chose to make an arrangement under which the father was to be placed in the same position as under the will, both as regards estate and as regards power. And this being so, I think that the father could thereafter sell under precisely the same conditions as before.

I declare that the objections of the purchaser to the title have been sufficiently answered, and that the vendor can make a good title under the settlement created by the will, and on the terms of the purchase money being paid to the trustees of that settlement for the purposes of the Settled Land Acts. The purchaser must pay the costs of the summons.

Solicitors for the applicant: *Harman & Son,* for *H. F. Bennett, Banbury.*

Solicitors for the respondent: *Farrer & Co.*

(1) [1906] 2 Ch. 502. (2) [1919] 1 Ch. 178.

F. E.

AUERBACH *v.* NELSON.

ASTBURY J.

1919

July 3, 4.

[1919. A. 286.]

Vendor and Purchaser—Parol Contract—Memorandum—Parties—Parcels—Parol Evidence—Statute of Frauds (29 *Car.* 2, *c.* 3), *s.* 4.

On November 21, 1918, the plaintiff paid the defendant 10*l.* and received the following receipt:—

" 6d. stamp. 21/11/1918.

Received of Mr. Auerbach . . . . 10*l.* on account of House being sold for 500*l.* from Mr. M. Nelson. . . . . Possession to be taken in six weeks after date.

1*d.* stamp. MORRIS NELSON.
21/11/1918."

The plaintiff alleged and proved that on November 21, 1918, before signing this receipt the defendant verbally agreed to sell him his house and residence, Nelson Lodge, for 500*l.*, with possession in six weeks, and that the 10*l.* was paid as a deposit on account of the purchase money. The plaintiff claimed specific performance.

The defendant relied on the Statute of Frauds:—

Held, that the receipt was a sufficient memorandum of the verbal contract, the date, parties and price being apparent on the face of it, and the actual " house being sold " by the defendant to the plaintiff on that date at that price being readily ascertainable by parol evidence.

Shardlow v. *Cotterell* (1881) 20 Ch. D. 90 and *Plant* v. *Bourne* [1897] 2 Ch. 281 applied.

WITNESS ACTION.

On November 21, 1918, the plaintiff paid the defendant 10*l.* and received the following receipt:—

" 6*d.* stamp. 21/11/1918.

Received of Mr. Auerbach, 197, High Street, Shoreditch, 10*l.* on account of House being sold for 500*l.* from Mr. M. Nelson, Nelson Lodge, 143, Victoria Park Road.

Possession to be taken in six weeks after date.

1*d.* stamp. MORRIS NELSON,
21/11/1918."

The plaintiff alleged that on November 21, 1918, before signing this receipt the defendant verbally agreed to sell him his house and residence, Nelson Lodge, for 500*l.*, with possession in six weeks, and that the 10*l.* was paid as a deposit on account of the purchase money.

ASTBURY J. 1919 AUERBACH v. NELSON.

The defendant having failed to complete, owing to the difficulty of finding another residence, the plaintiff brought this action for specific performance, relying on the receipt as a sufficient memorandum of the alleged verbal contract within the Statute of Frauds.

In addition to denying the verbal contract, which was however fully proved by the evidence, the defendant also contended that the memorandum was insufficient as neither the purchaser nor the property was sufficiently indicated or described.

The latter point is alone reported.

Fairfax Luxmoore K.C. and *Harman* for the plaintiff. The memorandum is sufficient.

The plaintiff Auerbach, who on November 21, 1918, paid 10*l.* on account of some house being sold by the defendant for 500*l.* with possession in six weeks, is clearly indicated as the purchaser. The property is some definite house being sold by the defendant to the plaintiff on that date at that price.

The actual house can be identified by parol evidence: Fry on Specific Performance, 5th. ed., p. 168; *Ogilvie* v. *Foljambe* (1); *Shardlow* v. *Cotterell* (2); *Plant* v. *Bourne.* (3)

Micklem K.C. and *Zeffertt* for the defendant. The memorandum is of course consistent with the parol contract. But that is not the test. You must consider the memorandum before you let in any parol evidence at all. There must be at least a suggestion that the memorandum records particulars of some contract of sale. The parties to that contract must be sufficiently described: *Rossiter* v. *Miller.*(4) Now in this memorandum there is nothing to suggest that the 10*l.* was paid as a "deposit" on account of the purchase money as in *Shardlow* v. *Cotterell* (2), or otherwise to indicate that the plaintiff was the purchaser: *Studds* v. *Watson* (5); *Long* v. *Millar.* (6) Apart from the parol evidence

(1) (1817) 3 Mer. 53.
(2) 20 Ch. D. 90.
(3) [1897] 2 Ch. 281.
(4) (1878) 3 App. Cas. 1124, 1140.
(5) (1884) 28 Ch. D. 305, 307.
(6) (1879) 4 C. P. D. 450, 455.

the defendant might quite well have been selling some house as agent for the plaintiff with possession in six weeks, and the 10*l.* might have been the agent's commission on account of house being so sold.

Even if it can be assumed that the memorandum purports to record particulars of a contract of sale from the defendant to the plaintiff, there is no attempt to specify the house or its situation. In *Plant* v. *Bourne* (1) Chitty L.J. attached great importance to the fact that "It is not twenty-four acres of land anywhere in England, but the place, the county, and the parish are all mentioned." Here no doubt some house in England or elsewhere was being sold for 500*l.* But that is far too vague to let in parol evidence. *Plant* v. *Bourne* (1) is criticised in Williams on Vendors and Purchasers, 2nd ed., p. 6. The decision in *Shardlow* v. *Cotterell* (2) turned on the receipt, memorandum and conditions. The remarks as to the receipt alone being sufficient are only dicta, which if correct would go a long way to nullify the Statute of Frauds.

Luxmoore K.C. in reply.

ASTBURY J., after stating the facts and holding that the verbal contract was fully proved, continued: The only question is whether the memorandum is sufficient within the Statute of Frauds.

The vendor contends that it is insufficient for two reasons—namely, first the purchaser is not sufficiently indicated; secondly the property is not sufficiently described.

On these points the general observations of Jessel M.R. in *Shardlow* v. *Cotterell* (2) must be borne in mind. He said (3): "No description can be framed that will prevent all disputes, and the framers of the Statute of Frauds knew very well that they could not prevent perjury altogether, but could only go some way towards it; and it was considered that to require a note in writing was a useful check. It could be nothing more: it could not entirely prevent perjury, for parties may suborn witnesses to swear to the existence, destruction,

(1) [1897] 2 Ch. 281, 290. (2) 20 Ch. D. 90.
(3) 20 Ch. D. 93.

ASTBURY J. 1919 AUERBACH v. NELSON.

and contents of a memorandum which never in fact existed. Looking at the statute in that light, what is a sufficient description? I consider that any two specific terms are enough to point out sufficiently what is sold. For instance, 'the estate of A. B. in the county of C.,' or 'the estate of A. B. which he bought of C. D.,' or 'the estate of A. B. which was devised to him by C. D.,' would be sufficiently specific. If so, why should not 'the property which A. B. bought of C. D. on March 29, 1880,' be sufficient? Would anybody doubt that in a will 'the property which I bought of C. D. on March 29, 1880,' would be a sufficient description? If it is so in a will why not in a contract?"

In that case Jessel M.R. and Baggallay L.J. held that the following receipt alone, without referring to other documents, was a sufficient memorandum: "Pinxton, March 29, 1880. Received of Mr. A. Shardlow the sum of 21*l.* as deposit on property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton, Owner." This was signed by the auctioneer. Jessel M.R. said (1): "It has not been contested that if the receipt had said 'on a house purchased' there would have been a sufficient description, but it has been argued that because the word 'property' is used the description is insufficient, and Kay J. has so decided." Further on (2) he agreed with Kay J. that "You must have on the face of the contract a sufficient definite description of the thing sold to enable you to introduce parol evidence to show what the articles were to which that description refers." Baggallay L.J. adopted (3) the statement in Dart's Vendors and Purchasers, 5th ed., p. 219 [7th ed., p. 238], that "a general description of the estate is sufficient if parol evidence can be produced to show what property was intended."

It is plain in the present case that the point as to the non-identification of the purchaser is bad because the memorandum says: "Received of Mr. Auerbach . . . . 10*l.* on account of House being sold for 500*l.* from Mr. M. Nelson . . . ." and in the absence of evidence aliunde the clear inference is that

(1) 20 Ch. D. 92. (2) 20 Ch. D. 95.
(3) 20 Ch. D. 96.

Auerbach who paid the 10*l.* was the purchaser. The similar receipt in *Shardlow* v. *Cotterell* (1) was sufficient on this point.

On the whole I also think there is a sufficient description of the property to admit parol evidence of identity. In *Shardlow* v. *Cotterell* (1), the description was "Property purchased at 420*l.* at Sun Inn, Pinxton, on the above date. Mr. George Cotterell, Pinxton, Owner." That was held sufficient. Here it is "House being sold for 500*l.* from Mr. M. Nelson" to Auerbach on November 21, 1918. This is quite as explicit as the memorandum in *Shardlow* v. *Cotterell*. (1)

In *Plant* v. *Bourne* (2): the description was vaguer still, namely, "twenty-four acres of land, freehold, ... at Totmonslow, in the parish of Draycott, in the county of Stafford." Byrne J. held that there was no sufficient identification of the subject-matter. The Court of Appeal however held that the vendor Plant was presumably selling his own 24 acres, and the description being therefore equivalent to "Plant's 24 acres at Totmonslow," was sufficient to let in extrinsic evidence to show that he had only 24 acres at that place. Lindley L.J.(3) after referring to *Ogilvie* v. *Foljambe* (4) and *Shardlow* v. *Cotterell* (5), adopted the principle expressed by Lush L.J. in the latter case to wit: "The general rule is, *Id certum est quod certum reddi potest*, and I am of opinion that this maxim applies here. In *Ogilvie* v. *Foljambe* (4) parol evidence was wanted just as much as here to show what was the subject-matter of the contract, and [Kay J.'s judgment in the present case (6)], if carried to its legitimate results, would establish that no contract can be good within the statute unless it describes the property in such a way that it is wholly unnecessary to resort to parol evidence." Chitty L.J. said (7): "It would be refinement, and not promoting justice, if we were to hold this description fails because 'my' is not to be found before the 'twenty-four,' or the definite article 'the.'" In other words the Court assumes

(1) 20 Ch. D. 90.
(2) [1897] 2 Ch. 281.
(3) [1897] 2 Ch. 288.
(4) 3 Mer. 53.
(5) 20 Ch. D. 90, 98.
(6) 18 Ch. D. 289, 291-295.
(7) [1897] 2 Ch. 290.

ASTBURY J. 1919 AUERBACH v. NELSON.

that a man is selling his own property and that the man who pays the deposit is the purchaser.

The description of the property as a house being sold by Nelson to Auerbach for 500*l.* on November 21, 1918, is sufficient to let in parol evidence identifying the only house answering that description. The plaintiff is therefore entitled to specific performance.

Solicitors: *S. B. Cohen, Dunn & Co.; S. Myers & Son.*

G. R. A.

PETERSON J. 1919 *April* 3, 8. *May* 8.

In re KEIGHLEY.

KEIGHLEY *v.* KEIGHLEY.

[1918 K. 488.]

Power of Appointment—Objects—"My people"—Appointment to Daughter of Donor's Sister born out of Wedlock—Valid Exercise.

The donee of a general power of appointment bequeathed all she died possessed of to her husband for use during his life, and at his death "to be willed to my people as he knows I should wish it." By his will the husband, in accordance with his wife's wish expressed to him during her lifetime, gave all the property in which he had a life interest under his late wife's will to the child of an illegitimate daughter of his wife's mother:—

Held, a valid exercise by the husband of the selective power of appointment given to him by his wife.

Lambe v. *Eames* (1871) L. R. 6 Ch. 597 and *Humble* v. *Bowman* (1878) 47 L. J. (Ch.) 62 applied.

ADJOURNED SUMMONS.

G. B. having a general power of appointment by will over one-eighth share of the residuary estate of her father, the above-mentioned testator, died, having made her will in the following terms: "I give and bequeath all I die possessed of for use during his life to my husband H. B. and at his death to be willed to my people as he knows I should wish it."

H. B. subsequently died having by his will and in

accordance with his wife's wish expressed to him during her lifetime given all the property in which he had a life interest under his late wife's will to G. S. H., his late wife's niece, absolutely.

G. S. H. was the child of F. T., a daughter, born out of wedlock, of N. T., G. B.'s mother, previously to N. T.'s marriage with G. B.'s father, the above-mentioned testator, who, and whose children, including G. B., had always regarded F. T. as his wife's daughter, and the latter was treated as one of the family and maintained by the original testator until her marriage.

The summons was taken out by the trustees of the original testator's will, and raised (inter alia) the question whether H. B.'s will was a valid exercise of the power contained in G. B.'s will.

P. F. Wheeler for the plaintiffs.

Roope Reeve for the statutory next of kin of G. B. referred to *Burrough* v. *Philcox* (1); *Pope* v. *Whitcombe* (2); as corrected in *Finch* v. *Hollingsworth* (3); *Forbes* v. *Ball* (4); *Rayner* v. *Mowbray* (5); *In re Caplin's Will* (6); *In re Deakin* (7); *Grant* v. *Lynam* (8); Farwell on Powers, 3rd ed., pp. 528, 568 (r. 7), 570; and distinguished *In re Weekes' Settlement.* (9)

Bryan Farrer for the relations in blood of G. B. relied on *Snow* v. *Teed.* (10)

Dollar (*Owen Thompson* with him) for the children of the original testator entitled in default of appointment referred to *In re Davies' Trusts* (11); *In re Thurston* (12); *In re Boyd* (13); *In re Seabrook* (14); *In re Pryce* (15); *In re Pinède's Settlement* (16); and *Coxen* v. *Rowland.* (17)

(1) (1840) 5 My. & Cr. 72.
(2) (1810) 3 Mer. 689.
(3) (1855) 21 Beav. 112.
(4) (1817) 3 Mer. 437.
(5) (1791) 3 Bro. C. C. 234.
(6) (1865) 2 Dr. & Sm. 527.
(7) [1894] 3 Ch. 565, 575.
(8) (1828) 4 Russ. 292.
(9) [1897] 1 Ch. 289.
(10) (1870) L. R. 9 Eq. 622.
(11) (1871) L. R. 13 Eq. 163.
(12) (1886) 32 Ch. D. 508.
(13) [1897] 2 Ch. 232.
(14) [1911] 1 Ch. 151.
(15) [1911] 2 Ch. 286, 294.
(16) (1879) 12 Ch. D. 667.
(17) [1894] 1 Ch. 406.

PETERSON J. 1919 KEIGHLEY, *In re.* KEIGHLEY *v.* KEIGHLEY.

A. Adams for the defendant G. S. H. referred to *In re Hamilton* (1); *Chamberlain* v. *Hutchinson* (2); *Wilkinson* v. *Schneider* (3); *In re Van Hagan* (4); *In re Davies' Trusts* (5); *In re Pryce* (6); *In re Thurston* (7); *Willoughby Osborne* v. *Holyoake* (8); *In re Ickeringill's Estate* (9); *Attorney-General* v. *Brackenbury* (10); *Lambe* v. *Eames* (11); *In re Jodrell* (12); and *Humble* v. *Bowman*. (13)

Cur. adv. vult.

May 8. PETERSON J. stated the facts, and continued: The question is whether H. B.'s will is a valid exercise of the power contained in the will of G. B. It is contended by some of the parties that the power to appoint to G. B.'s people only authorized an appointment to one or more of her legitimate relations, and that, therefore, the appointment to G. S. H. is outside of the scope of the power. Others contend that the power to appoint to G. B.'s people is too vague, and, therefore, the property goes in default of appointment. A number of interesting problems arose for discussion as one or other of these divergent contentions prevailed. But on the view which I take it will be unnecessary to search for the proper solution of those ulterior questions. The words "my people" are not words of art. According to the Imperial Dictionary they may mean those who are closely connected with a person as attendants, domestics, or followers; sometimes relatives or ancestors. In the Oxford English Dictionary the word is said to mean: "Those to whom anyone belongs; the members of one's tribe, clan, family, community, association, church, etc., collectively; one's parents, brothers and sisters, or other relatives at home." One of the illustrations given is taken from Carlyle's Sterling: "Mrs. Sterling and the family had lived with his father's people through

(1) [1895] 2 Ch. 370.
(2) (1856) 22 Beav. 444.
(3) (1870) L. R. 9 Eq. 423.
(4) (1880) 16 Ch. D. 18.
(5) L. R. 13 Eq. 163.
(6) [1911] 2 Ch. 286, 294.
(7) 32 Ch. D. 508.
(8) (1882) 22 Ch. D. 238.
(9) (1881) 17 Ch. D. 151.
(10) (1863) 1 H. & C. 782.
(11) L. R. 6 Ch. 597.
(12) (1890) 44 Ch. D. 590, 607.
(13) 47 L. J. (Ch.) 62.

the winter." The word does not appear to me to be confined to persons who are strictly relatives, thus it may, I think, include a stepfather or stepmother. In this will it was in my view used to denote the family to which the testatrix belonged, or persons who were connected with the testatrix by family ties.

There are two cases on which reliance has been placed by counsel for G. S. H. In *Lambe* v. *Eames* (1) a testator gave his estate to his widow to be at her disposal in any way she might think best for the benefit of herself and family. The widow by will gave a part of the testator's estate to an illegitimate son of one of the testator's sons. The Court expressed the opinion that if the testator's widow did not take an absolute interest and the "family" of the testator took some interest under his will, the widow in providing for the illegitimate grandson had not exceeded her power. In *Humble* v. *Bowman* (2) a testator left his estate to his widow for life to be distributed to the testator's "family" at her death as she might think proper. The widow appointed a sum of money to one of her children by the testator who was illegitimate. Hall V.-C. held that the exercise of such a power of appointment in favour of an illegitimate child who had been treated as a child by her parent was valid. These cases turned on the meaning of the word "family" in a selective power of appointment. The words "my people" do not appear to me to have a more restricted, or less flexible signification than the words "my family," and I think that I may follow the guidance of those two cases and hold that in the present case the appointment in favour of G. S. H. is not in excess of the power conferred on H. B. by G. B.'s will.

Solicitors: *Kinch & Richardson, for Smith & Smith, Burnley; Tatham & Lousada, for Farrar & Co., Manchester.*

(1) L. R. 6 Ch. 597. (2) 47 L. J. (Ch.) 62.

R. M.

END OF VOL. II.

The Mode of Citation of the Volumes of the *Law Reports* commencing January 1, 1919, will be as follows:—

In the First Series,
[1919] 1 Ch. [1919] 2 Ch.

In the Second Series,
[1919] 1 K. B. [1919] 2 K. B. [1919] P.

In the Third Series,
[1919] A. C.

INDEX.

ACCOUNT—Limitations—Statutes of - 50
See ADMINISTRATION.

ACTION — Crown — Interim injunction—Undertaking in damages - 339
See CROWN.

"ADAPTED TO DISTINGUISH" - 28
See TRADE MARK.

ADEMPTION - - - - - 189
See WILL.

ADMINISTRATION - - - - 50
See LIMITATIONS—STATUTES OF.

AMBIGUITY—Will - - - - 178
See WILL.

ANNUITY— *Income Tax—Settlement—Construction—Settlement of Shares in trading Company—Dividends received by Trustees after Deduction of Income Tax—Trust after Death of Settlor's Son to pay Income up to 2000l. per annum to his Widow for Life—Balance of unapplied Income to be accumulated in Trust for Children—Right of Trustees to deduct Income Tax from Widow's Annuity. In re* CAIN'S SETTLEMENT. CAIN *v.* CAIN C. A. 364

APPOINTMENT—Power of.
See POWER OF APPOINTMENT.

APPORTIONMENT—Partnership—Profits
See WILL. 93

APPROPRIATION—Payments - - 189
See WILL.

—— Unsold real estate - - - 58
See WILL.

"ARTICLES OF VIRTU AND CURIOSITIES" - - - - - 178
See WILL.

ASSIGNMENT—Benefit of restrictive covenants—Operation of law - 314
See VENDOR AND PURCHASER.

—— Gift - - - - - - - 104
See GIFT.

—— Marriage settlement—Trustees - 161
See SETTLEMENT.

AUTHORITY—Bank—Payment of money
See GIFT. 104

BANK—Account—Appropriation of payments - - - - - 189
See WILL.

—— Deposit receipt - - - - 104
See GIFT.

—— Plate at - - - - - - 178
See WILL.

BARONETCY—Bequest to legatee on acquisition of - - - - 305
See WILL.

BEQUEST.
See WILL.

BIAS—*Judicial Inquiry—Domestic Forum—Patent Agent—Chartered Institute—Removal of Name from Membership—Board of Trade Inquiry—Accusers as Judges—Injunction—Register of Patent Agents Rules*, 1908, *rr.* 17, 19. LAW *v.* CHARTERED INSTITUTE OF PATENT AGENTS - - - Eve J. 276

BLACKSTONE'S COMMENTARIES, vol. ii., p. 43—Definition of "rack rent" in, discussed and applied. *In re* SAWYER AND WITHALL - - - - - - - 333

BOARD OF TRADE INQUIRY—Patent agent
See BIAS. 276

BOOKS—Manuscripts - - - - 178
See WILL.

BREACHES—Particulars—Patent - 67
See INTERROGATORIES.

BUILDING ESTATE—Covenants - 314
See VENDOR AND PURCHASER.

BUSINESS—Testator's—Sale of prior to death — Will - - - - 93
See WILL

CAPITAL OR INCOME - - - 93
See WILL.

CASES:—

—— *Ascherson* v. *Tredegar Dry Dock and Wharf Co.* [1909] 2 Ch. 401.
Distinguished. MORRISON *v.* BARKING CHEMICALS CO. - - 325

—— *Ashton Gas Co.* v. *Attorney-General* [1906] A. C. 10.
Applied. *In re* CAIN'S SETTLEMENT. CAIN *v.* CAIN - - **C. A. 364**

—— *Benno Jaffé und Darmstaedter Lanolin Fabrik* v. *John Richardson & Co.* (1893) 10 Rep. Pat. Cas. 136.
Distinguished. AKTIENGESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO. - - - - **C. A. 67**

—— *Blow, In re* [1914] 1 Ch. 233, 243
Applied. *In re* RICHARDSON. POLE *v.* PATTENDEN - - - 50

—— *Brooke* v. *Price* [1917] A. C. 115.
Distinguished. *In re* CAIN'S SETTLEMENT. CAIN *v.* CAIN - **C. A. 364**

—— *Bullock* v. *Downes* (1860) 9 H. L. C. 1.
Followed. *In re* HUTCHINSON. CARTER *v.* HUTCHINSON - **C. A. 17**

—— *Carne's Settled Estates, In re* (1898) L. J. Ch. 120.
Distinguished. *In re* GIBBONS 99

—— *Chesterfield's (Earl of) Trusts, In re* (1893) 24 Ch. D. 643.
Principle settled in, adopted and followed. *In re* HOLLEBONE - 93

—— *Clayton's Case* (1816) 1 Mer. 572.
Rule in, not applied. *In re* HODGSON'S TRUSTS. PUBLIC TRUSTEE *v.* MILNE - - - - - - 189

—— *Collins* v. *Sedgwick* [1917] 1 Ch. 179.
Approved and followed. PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON - - - **C. A. 254**

—— *Condran, In re* [1917] 1 Ch. 639.
Approved and followed. PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON - - - **C. A. 254**

—— *Connolly to Sheridan and Russell, Ex parte* [1900] 1 I. R. 1, 6.
Definition of "rack rent" by Holmes J. in, discussed and applied. *In re* C. R. SAWYER AND WITHALL 333

—— *Constable's Settled Estates, In re* [1919] 1 Ch. 178, 192.
Followed. *In re* COPE AND WADLAND'S CONTRACT - - - - 376

CASES—*continued.*

—— *Croyden, In re* (1911) 55 Sol. J. 632.
Followed. *In re* RICHARDSON. POLE *v.* PATTENDEN - - 50

—— *Croft* v. *Blay* (*William F.*), *Ld.* [1919] 1 Ch. 277.
Affirmed - - - **C. A. 343**

—— *Doe* v. *Stenlake* (1810) 12 East, 515.
Followed. *In re* MOUNTGARRET 294

—— *Du Cane and Nettlefold's Contract, In re* [1898] 2 Ch. 96.
Followed. *In re* COPE AND WADLAND'S CONTRACT - - - 376

—— *Egerton* v. *Earl Brownlow* (1853) 4 H. L. C. 1.
Distinguished. *In re* WALLACE. CHAMPION *v.* WALLACE - 305

—— *Espuela Land and Cattle Co., In re* [1909] 2 Ch. 187.
Followed. *In re* FRASER AND CHALMERS, LD. - - - 114

—— *Fellows* (*S. J. & E.*), *Ld.* v. *Corker* [1918] 1 Ch. 9.
Overruled. PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON **C. A. 254**

—— *Formby* v. *Barker* [1903] 2 Ch. 539.
Distinguished. IVES *v.* BROWN 314

—— *Hill* v. *Thomas* [1893] 2 Q. B. 333.
Followed. WESTON-SUPER-MARE U. D. C. *v.* BUTT (HENRY) & CO. **C. A. 1**

—— *Hollins* (*William*) *& Co.* v. *Paget* [1917] 1 Ch. 187.
Distinguished and explained. PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON - - **C. A. 254**

—— *Hugo* v. *Williams* (1872) L. R. 14 Eq. 224.
Followed. *In re* MOUNTGARRET. MOUNTGARRET *v.* INGILBY - 294

—— *Humble* v. *Bowman* (1878) 47 L. J. (Ch.) 62.
Applied. *In re* KEIGHLEY. KEIGHLEY *v.* KEIGHLEY - - - 388

—— *Lacons* v. *Warmoll* [1907] 2 K. B. 350, 367.
Followed. *In re* RICHARDSON. POLE *v.* PATTENDEN - - 50

—— *Lambe* v. *Eames* (1871) L. R. 6 Ch. 597, 47 L. J. (Ch.) 62.
Applied. *In re* KEIGHLEY. KEIGHLEY *v.* KEIGHLEY - - - 388

—— *Locke & Smith, Ld., In re* [1914] 1 Ch. 687.
Not followed. *In re* BRITISH CONSOLIDATED OIL CORPORATION 81

—— *Mortimore* v. *Mortimore* (1879) 4 App. Cas. 448.
Followed. *In re* HUTCHINSON. CARTER *v.* HUTCHINSON - **C. A. 17**

CASES—*continued.*

—— *Mundy and Roper's Contract, In re* [1899] 1 Ch. 275, 296.
Followed. *In re* COPE AND WADLAND'S CONTRACT - - - **376**

—— *National Telephone Co., In re* [1914] 1 Ch. 755.
Observations in, not followed. *In re* FRASER AND CHALMERS, LD. **114**

—— *Paget's Settled Estates, In re* (1885) 30 Ch. D. 161.
Distinguished. *In re* GIBBONS **99**

—— *Patent Castings Syndicate, Ld.* v. *Etherington* [1919] 1 Ch. 306.
Affirmed - - - **C. A. 254**

—— *Petition of Right, In re a* [1915] 3 K. B. 649.
Distinguished. *In re* DE KEYSER'S ROYAL HOTEL, LD. - **C. A. 197**

—— *Piccadilly Hotel, Ld., In re* [1911] 2 Ch. 534.
Applied. *In re* BRITISH CONSOLIDATED OIL CORPORATION - **81**

—— *Plant* v. *Bourne* [1897] 2 Ch. 281.
Applied. AUERBACH *v.* NELSON **383**

—— *Renals* v. *Cowlishaw* (1878) 9 Ch. D 125, 11 Ch. D. 866.
Applied. IVES *v.* BROWN - **314**

—— *Rogers* v. *Hosegood* [1900] 2 Ch. 388
Distinguished. IVES *v.* BROWN **314**

—— *Saccharin Corporation, Ld.* v. *Haines, Ward & Co.* (1898) 15 Rep. Pat. Cas. 344. Distinguished. AKTIENGESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO. - - - **C. A. 67**

—— *Shardlow* v. *Cotterell* (1881) 20 Ch. D. 90.
Applied. AUERBACH *v.* NELSON **383**

—— *South Western of Venezuela (Barquisimeto) Rly. Co., In re* [1902] 1 Ch. 701.
Applied. *In re* BRITISH CONSOLIDATED OIL CORPORATION - **81**

—— *Sykes* v. *Howarth* (1879) 12 Ch. D. 826.
Distinguished. AKTIENGESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO. - - - **C. A. 67**

—— *Teofani & Co.'s Trade Mark, In re* [1913] 2 Ch. 545, 569.
Dictum of Kennedy L.J. in, approved. *In re* H. G. BURFORD & CO.'S APPLICATION - - **C. A. 28**

—— *Thomas* v. *Hamlyn & Co.* [1917] 1 K. B. 527.
Distinguished and explained. PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON - - **C. A. 254**

—— *Weston-super-Mare U. D. C.* v. *Butt (Henry) & Co.* [1919] 1 Ch. 11.
Affirmed - - - **C. A. 1**

CASES—*continued.*

—— *Wilkinson* v. *Duncan* (1857) 23 Beav. 469.
Principle settled in, adopted and followed. *In re* HOLLEBONE **93**

—— *Wilson, In re* [1907] 2 Ch. 572.
Followed. *In re* HUTCHINSON. CARTER *v.* HUTCHINSON - **C. A. 17**

—— *Wimborne (Lord) and Browne's Contract, In re* [1904] 1 Ch. 537.
Followed. *In re* COPE AND WADLAND'S CONTRACT - - - **376**

CHARTERED INSTITUTE—Patent agents
See BIAS. **276**

CHATTELS—Bequest of - - - **178**
See WILL.

CHOSE IN ACTION - - - - **104**
See GIFT.

CLASS—Next of kin—Time for ascertaining
See WILL. **17**

CLAYTON'S CASE—Rule in - - **189**
See WILL.

CLIENT—Solicitor and - - - **333**
See SOLICITOR.

COMMENCEMENT—Implied tenancy from year to year—Date of - - **343**
See LANDLORD AND TENANT.

COMMISSION—Company—Manager - **254**
See COMPANY.

COMPANY—*Debenture Stock—Trust Deed—Remuneration of Trustees—Contract—Construction—Appointment of Receiver—Right of Trustees to subsequent Remuneration. In re* BRITISH CONSOLIDATED OIL CORPORATION, LD. HOWELL *v.* THE CO. **Peterson J. 81**

2. —— *Manager's Remuneration — Agreement—Construction—Commission on "net profits"—Deduction of Excess Profits Duty — Finance (No. 2) Act*, 1915 (5 *& 6 Geo. 5, c. 89), ss. 35, 40, 45, sub-s. 3* PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON - - - **C. A. 254**

3. —— *Winding up—Execution—Seizure by Sheriff before Presentation of Petition—Rent paid to Landlord by Sheriff—Claim to be repaid by Liquidator—Landlord and Tenant Act*, 1709 (8 *Anne, c. 14 [18 in Rev. Stat.]), s. 1—Companies (Consolidation), Act*, 1908 (8 *Edw. 7, c. 69), ss.* 139, 140 142, 211. *In re* BRITISH SALICYLATES, LD. **Astbury J. 155**

4. —— *Winding up — Preference Shares —Priority as to Capital—Surplus Assets—Right to participate—Companies (Consolidation) Act*, 1908 (8 *Edw. 7, c. 69), s.* 186. *In re* FRASER AND CHALMERS, LD. **Astbury J. 114**

COMPENSATION—Crown - - - **197**
See CROWN.

CONDITION—Will - - - 99, 305
See WILL.

CONSTRUCTION—Settlement - - 364
See ANNUITY.

—— Will - - - - - - - 99
See ESTATE TAIL and WILL.

CONTRACT—Parol—Statute of Frauds 383
See VENDOR AND PURCHASER.

CONVERSION—Will - - - - - 58
See WILL.

COSTS—Taxation—Lease - - - 333
See SOLICITOR.

COVENANT — Assignment of benefit of by operation of law - - 314
See VENDOR AND PURCHASER.

—— Marriage settlement — Life policy 161
See SETTLEMENT

CROWN—*Action by the—Interim Injunction—Undertaking in Damages—Infringement of registered Design—Practice—Defence Act*, 1842 (5 *&* 6 *Vict. c.* 94), *s.* 34—*Ordnance Board Transfer Act*, 1855 (18 *&* 19 *Vict. c.* 117), *ss.* 3, 4. SECRETARY OF STATE FOR WAR *v.* COPE. **P. O. Lawrence J. 339**

2.—— *Royal Prerogative — War — Defence of the Realm—Right of Crown to take Possession of Land and Buildings without Compensation—Defence Act*, 1842 (5 *&* 6 *Vict. c.* 94)—*Defence of the Realm (Consolidation) Act*, 1914 (5 *Geo.* 5, *c.* 8), *and Regulations thereunder. In re* DE KEYSER'S ROYAL HOTEL, LD. DE KEYSER'S ROYAL HOTEL, LD. *v.* REX - - - - - **C. A. 197**

CY-PRÈS DOCTRINE - - - - 294
See ESTATE TAIL.

DAMAGES — Measure of — Extraordinary traffic - - - - - - - 1
See HIGHWAY.

—— Undertaking — Interim injunction — Crown - - - - - - 339
See CROWN.

DATE—Commencement—Implied tenancy from year to year - - - 343
See LANDLORD AND TENANT.

DEBENTURE STOCK - - - 81
See COMPANY.

DEBT—Assignment - - - - 104
See GIFT.

DEDUCTION—Income tax—Annuity - 364
See ANNUITY.

DEFENCE OF THE REALM—Acts and regulations - - - - - 197
See CROWN.

DELIVERY - - - - - - 104
See GIFT.

DEPOSIT—Bank—Money on - - 104
See GIFT.

DISENTAILING DEED—Resettlement 376
See SETTLED LAND.

DISTINCTIVE WORD—Trade mark—Registration—Special application - 28
See TRADE MARK.

DIVIDENDS—Received by trustees—Deduction of income tax - - - 364
See ANNUITY.

DOMESTIC FORUM - - - - 276
See BIAS.

ENTAIL - - - - - - - 294
See ESTATE TAIL.

ESTATE FOR LIFE - - - - 294
See ESTATE TAIL.

ESTATE TAIL—*Will—Construction—Real Estate—Successive Limitations to unborn Persons—Estates for Life or in Tail—Gift Over—Remoteness—Cy-près Doctrine. In re* MOUNTGARRET. MOUNTGARRET *v.* INGILBY. **P. O. Lawrence J. 294**

EVIDENCE—Parol contract - - 383
See VENDOR AND PURCHASER.

EXCESS PROFITS DUTY—Deduction of 254
See COMPANY.

EXECUTION—Company—Winding up 155
See COMPANY.

EXECUTOR—Covenantee—Right of to sue 314
See VENDOR AND PURCHASER.

—— Solicitor - - - - - - 50
See LIMITATIONS—STATUTES OF.

EXERCISE—Power of appointment - 388
See POWER OF APPOINTMENT.

EXPENSES—Extraordinary traffic - 1
See HIGHWAY.

"EXTRAORDINARY TRAFFIC" - 1
See HIGHWAY.

FINANCE (No. 2) ACT, 1915 - - 254
See COMPANY.

FORFEITURE - - - - 99
See WILL.

FRAUDS—Statute of - - - - 383
See VENDOR AND PURCHASER.

"FURNITURE" - - - - - 178
See WILL.

GEOGRAPHICAL NAME—Trade mark - 28
See TRADE MARK.

GIFT—*Assignment — Absolute Assignment in Writing—Money on Deposit at Bank—Banker's Deposit Receipt—Authority to Bank to pay—Delivery—Debt—Legal Chose in Action —Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *s.* 25, *sub-s.* 6. *In re* WESTERTON. PUBLIC TRUSTEE *v.* GRAY - - - **Sargant J. 104**

—— Residuary - - - - - - **93**
See WILL.

GIFT OVER—Remoteness - - - **294**
See ESTATE TAIL.

GUARANTEE - - - - - **325**
See PRINCIPAL AND SURETY.

HIGHWAY—*Repairs — "Extraordinary traffic" — Expenses — Measure of Damages —Steam Wagons and Trailers—Standard of Repair—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*). WESTON-SUPER-MARE U. D. C. *v.* HENRY BUTT & Co. - **C. A. 1**

HIGHWAYS AND LOCOMOTIVES (AMENDMENT) ACT, 1878 - - - **1**
See HIGHWAY.

HOLDING OVER - - - - - **343**
See LANDLORD AND TENANT.

HOUSE—Residence for life on conditions—Will - - - - - - **99**
See WILL.

HUSBAND—Marriage settlement—Covenant by to maintain life policy - **161**
See SETTLEMENT.

ILLEGITIMATE CHILD—Appointment to **388**
See POWER OF APPOINTMENT.

IMPLIED TENANCY—From year to year—Date of commencement - **343**
See LANDLORD AND TENANT.

IMPOUNDING—Interest under settlement
See SETTLEMENT. **161**

INCOME—Capital or - - - - - **93**
See WILL.

INCOME TAX—Annuity—Deductions **364**
See ANNUITY.

INFRINGEMENT—Patent - - - **67**
See PATENT.

—— Registered design - - - **339**
See CROWN.

INJUNCTION.
See BIAS, CROWN and TRADE UNION.

INSTALMENTS—Payment by—Sale of testator's business prior to death — Conversion - - - - - **93**
See WILL.

INTERIM INJUNCTION—Undertaking in damages—Crown - - - **339**
See CROWN.

INTERROGATORIES—*Patent — Action for Infringement — Particulars of Breaches—Interrogatories confined to Breaches specified in Particulars — Practice—Rules of Supreme Court, Order* LIII. A, *rr.* 13, 16, 21. AKTIENGESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO. **C. A. 67**

INVESTMENT CLAUSE—Will - - **58**
See WILL.

JUDICIAL INQUIRY—Domestic forum **276**
See BIAS.

LAND—Buildings—Right of Crown to take possession of without compensation.
See CROWN. **197**

LANDLORD—Rent paid to by sheriff — Claim by liquidator - - **155**
See COMPANY.

LANDLORD AND TENANT—*Lease for One Year and Part of Another—Holding over — Implied Tenancy from Year to Year—Date of Commencement—Notice to quit.* CROFT *v.* BLAY (WILLIAM F.), LD. - - **C. A. 343**

LAPSE—Policy - - - - - **161**
See SETTLEMENT.

—— Time - - - - - - - **50**
See LIMITATIONS—STATUTES OF.

LEASE—Costs—Taxation - - - **333**
See SOLICITOR.

LEGACY.
See WILL.

LIFE—Estate for - - - - **294**
See ESTATE TAIL and SETTLED LAND.

—— Policy—Settlement - - - **161**
See SETTLEMENT.

—— Residence for - - - - - **99**
See WILL.

LIMITATIONS—Successive to unborn persons - - - - - - **294**
See ESTATE TAIL.

LIMITATIONS—STATUTES OF—*Administration — Account — Executor Solicitor — Action by Beneficiary—Share of Residue—Lapse of Time—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Trustee Act*, 1888 (51 & 52 *Vict. c.* 59), *s.* 8, *sub-s.* (1), (*a*) *and* (*b*). POLE *v.* PATTENDEN. **Peterson J. 50**

LIQUIDATOR—Company—Winding up **155**
See COMPANY.

LOCOMOTIVES ACT, 1898 - - - **1**
See HIGHWAY.

LUNACY—Order in—Mistake - - **189**
See WILL.

MANAGER — Company — Remuneration—Agreement - - - - 254
See COMPANY.

MANUSCRIPTS—Books and - - 178
See WILL.

MARRIAGE SETTLEMENT - - 161
See SETTLEMENT.

MEASURE OF DAMAGES — Extraordinary traffic - - - - - - 1
See HIGHWAY.

MEMORANDUM—Parol contract—Sale of land—Parties—Parcels—Price 383
See VENDOR AND PURCHASER.

MONEY—Deposit at bank - - - 104
See GIFT.

"MY PEOPLE"—Power of appointment 388
See POWER OF APPOINTMENT.

"NET PROFITS"—Company - - 254
See COMPANY.

NEXT OF KIN—Gift to—Will—Time for ascertaining class - - - 17
See WILL.

NOTICE—Surety—To determine guaranteed unascertained liability - - 325
See PRINCIPAL AND SURETY.

—— To quit - - - - - - 343
See LANDLORD AND TENANT.

OBJECTS—Power of appointment - 388
See POWER OF APPOINTMENT.

OPTION—Will—House—Residence for life on conditions—Forfeiture - - 99
See WILL.

PARCELS—Sale of land—Parol contract—Memorandum - - - - 383
See VENDOR AND PURCHASER.

PAROL CONTRACT—Memorandum - 383
See VENDOR AND PURCHASER.

PARTICULARS—Breaches—Patent - 67
See INTERROGATORIES.

PARTIES—Parol contract—Memorandum 383
See VENDOR AND PURCHASER.

PARTNERSHIP—Profits—Apportionment
See WILL. 93

PATENT—Interrogatories - - - 67
See INTERROGATORIES.

PATENT AGENT—Chartered Institute - 276
See BIAS.

PAYMENT—Instalments—Sale of testator's business prior to death - - 93
See WILL.

—— Surety's right to by principal - 325
See PRINCIPAL AND SURETY.

PAYMENTS—Appropriation - - 189
See WILL.

PLATE — Deposited with bankers for safe custody - - - - - 178
See WILL.

POLICY—Life - - - - - - 161
See SETTLEMENT.

POWER—Sale—Tenant for life - - 376
See SETTLED LAND.

PRACTICE—Crown—Interim injunction—Undertaking in damages - 339
See CROWN.

—— Interrogatories - - - - 67
See INTERROGATORIES.

POWER OF APPOINTMENT—*Objects*—*"My people"— Appointment to Daughter of Donor's Sister born out of Wedlock— Valid Exercise. In re* KEIGHLEY. KEIGHLEY *v.* KEIGHLEY
Peterson J. 388

PREFERENCE SHARES - - - 114
See COMPANY.

PREROGATIVE—Royal - - - 197
See CROWN.

PRINCIPAL AND SURETY—*Surety's Right to Payment by Principal— Notice by Surety to determine guaranteed unascertained Liability.* MORRISON *v.* BARKING CHEMICALS CO.
Sargant J. 325

PRIORITY—Shares - - - - 114
See COMPANY.

PROFITS—Partnership - - - 93
See WILL.

PUBLIC POLICY—Bequest to legatee on acquisition of baronetcy - 305
See WILL.

QUIT—Notice to - - - - - 343
See LANDLORD AND TENANT.

RACK RENT—Lease - - - - 333
See SOLICITOR.

RARE BOOKS AND MANUSCRIPTS—"Articles of virtu and curiosities"
See WILL. 178

REAL AND PERSONAL ESTATE—Trust for sale - - - - - - 58
See WILL.

REAL ESTATE——Estates for life or in tail - - - - - - 294
See ESTATE TAIL.

REAL PROPERTY LIMITATION ACT, 1874
See LIMITATIONS, STATUTES OF. 50

RECEIPT—Banker's Deposit - - 104
See GIFT.

RECEIVER—Appointment of—Debenture stock - - - - - - 81
See COMPANY.

REGISTER—Patent agents - - 276
See BIAS.

REGISTRATION—Trade mark - - 28
See TRADE MARK.

REMAINDERMAN—Tenant for life and 93
See WILL.

REMOTENESS—Gift over - - - 294
See ESTATE TAIL.

REMUNERATION—Manager—Company 254
See COMPANY.

—— Trustees—Debentures - - - 81
See COMPANY.

RENT—Payment to landlord by sheriff—Company—Winding up - - 155
See COMPANY.

REPAIRS—Highway - - - - - 1
See HIGHWAY.

RESETTLEMENT - - - - 376
See SETTLED LAND.

RESIDENCE—Life—Conditions - - 99
See WILL.

RESIDENTIAL BUILDING ESTATE—Restrictive covenants - - 314
See VENDOR AND PURCHASER.

RESIDUE.
See LIMITATIONS, STATUTES OF, and WILL.

RESTRICTIVE COVENANTS—Assignment of benefit by operation of law— 314
See VENDOR AND PURCHASER.

ROYAL PREROGATIVE - - - 197
See CROWN.

RULE IN CLAYTON'S CASE - - 189
See WILL.

RULES AND ORDERS:—*Register of Patent Agents Rules*, 1908, *rr.* 17, 19. LAW *v.* CHARTERED INSTITUTE OF PATENT AGENTS - - - 276

—— *Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44) *General Order thereunder, Sched. I., Pt.* 2. *In re* C. R. SAWYER AND WITHALL. 333

—— *Supreme Court, Rules of, Order* LII.A, *rr.* 13, 16, 21. AKTIENGESELLSCHAFT FÜR AUTOGENE ALUMINIUM SCHWEISSUNG *v.* LONDON ALUMINIUM CO. C. A. 67

SALE—Postponing—Will - - - 58
See WILL.

—— Power—Tenant for life - - 376
See SETTLED LAND.

—— Testator's business—Conversion 93
See WILL.

SCALE FEE—Solicitor - - - 333
See SOLICITOR.

SETTLED LAND—*Tenant for Life—Disentailing Deed and Resettlement—Power of Tenant for Life to sell under original Settlement—Settled Land Act*, 1882 (45 & 46 *Vict.* c. 38), *ss.* 2 (*sub-s.* 4), 20, 50. *In re* COPE AND WADLAND'S CONTRACT Sargant J. 376

—— Tenant for Life—Option—House—Residence - - - - - 99
See WILL.

SETTLEMENT—Annuity—Deduction of income tax - - - - 364
See ANNUITY.

—— *Life Policy—Covenant by Husband to maintain—Lapse of Policy owing to Husband's Default—Right of Trustees to impound Husband's Interest under Settlement. In re* JEWELL'S SETTLEMENT WATTS *v.* PUBLIC TRUSTEE - - - - Younger J. 161

SHARES - - - - - 114, 364
See ANNUITY and COMPANY.

SHERIFF—Seizure by—Goods—Company—Winding up - - - - 155
See COMPANY.

SOLICITOR — *Client — Costs — Taxation — Lease—Rack Rent—"Long lease not at rack rent"—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict.* c. 44)—*General Order thereunder, Sched. I., Part* 2—*Scale Fee. In re* C. R. SAWYER AND WITHALL Sargant J. 333

—— Executor—Limitations, Statutes of 50
See LIMITATIONS, STATUTES OF.

SPECIAL APPLICATION—Trade mark—Registration - - - - 28
See TRADE MARK.

SPECIFIC LEGACY - - - - 189
See WILL.

STANDARD OF REPAIR — Extraordinary traffic - - - - - 1
See HIGHWAY.

STATUTE OF FRAUDS - - - 383
See VENDOR AND PURCHASER.

STATUTES:—

1677.

29 Car. 2, c. 3 (Statute of Frauds), s. 4: AUERBACH *v.* NELSON - - 383

1709.

8 Anne, c. 14 (Landlord and Tenant) [18 in Rev. Stat.], s. 1: *In re* BRITISH SALICYLATES, LD. - - - 155

1842.

5 & 6 Vict. c. 94 (Defence of the Realm): *In re* DE KEYSER'S ROYAL HOTEL, LD. - - - C A. 197

—— s. 34: SECRETARY OF STATE FOR WAR *v.* COPE - - - 339

STATUTES—*continued.*

1855.

18 & 19 Vict. c. 117 (Ordnance Board Transfer), ss. 3, 4: SECRETARY OF STATE FOR WAR *v.* COPE - 339

1873.

36 & 37 Vict. c. 66 (Judicature), s. 25, sub-s. 6: *In re* WESTERTON. PUBLIC TRUSTEE *v.* GRAY - 104

1874.

37 & 38 Vict. c. 57 (Real Property Limitation), s. 8: *In re* RICHARDSON 50

1878.

41 & 42 Vict. c. 77 (Highways and Locomotives), s. 23: WESTON-SUPER-MARE U. D. C. *v.* BUTT (HENRY) & Co. - - - - C. A. 1

1882.

45 & 46 Vict. c. 38 (Settled Land), ss. 2 (sub-s. 4), 20, 50: *In re* COPE AND WADLAND'S CONTRACT - - 376

—— s. 51: *In re* GIBBONS - - 99

1888.

51 & 52 Vict. c. 59 (Trustee), s. 8, sub-s. (1.), (*a*) and (*b*): *In re* RICHARDSON 50

1890.

53 & 54 Vict. c. 5 (Lunacy), s. 123: *In re* HODGSON'S TRUSTS. PUBLIC TRUSTEE *v.* MILNE - - 189

1898.

61 & 62 Vict. c. 29 (Locomotives), s. 12, sub-s. 1 (*b*): WESTON-SUPER-MARE U. D. C. *v.* BUTT (HENRY) & Co. C. A. 1

1905.

5 Edw. 7, c. 15 (Trade Marks), s. 9, para. 5; s. 44: *In re* H. G. BURFORD & Co.'s APPLICATION - - - C. A. 28

1906.

6 Edw. 7, c. 47 (Trade Disputes), s. 3; s. 5, sub-s. 3: VALENTINE *v.* HYDE 129

1908.

8 Edw. 7, c. 69 (Companies (Consolidation)), ss. 139, 140, 142, 211: *In re* BRITISH SALICYLATES, LD. - 155

—— s. 186: *In re* FRASER AND CHALMERS, LD. - - - - 114

1914.

5 Geo. 5, c. 8, Defence of the Realm (Consolidation): *In re* DE KEYSER'S ROYAL HOTEL, LD. C. A. 197

1915.

5 & 6 Geo. 5, c. 89 (Finance (No. 2)), ss. 35, 40, 45, sub-s. 3: PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON - - - C. A. 254

STEAM WAGONS AND TRAILERS—Extraordinary traffic - - - 1
See HIGHWAY.

SURETY.
See PRINCIPAL AND SURETY.

SURNAME—Trade mark - - - 28
See TRADE MARK.

SURPLUS—Assets—Company - - 114
See COMPANY.

TAIL—Estate - - - - - - 294
See ESTATE TAIL.

TAXATION—Costs—Lease - - - 333
See SOLICITOR.

TENANT—Landlord and - - - 343
See LANDLORD AND TENANT.

TENANT FOR LIFE
See SETTLED LAND and WILL.

TESTATOR
See WILL.

TEXT-BOOKS — Blackstone's Commentaries, vol. ii., p. 43—Definition of "rack rent" in, discussed and applied. *In re* SAWYER AND WITHALL - - - - - - - 333

—— Cole on Ejectment, 50—Statement in as to commencement of implied tenancy from year to year not supported by cases cited. CROFT *v.* BLAY (WILLIAM F.), LD. - 343

TIME—Lapse of - - - - - 50
See LIMITATIONS, STATUTES OF.

TRADE MARK—*Registration—Special Application—Distinctive Word—Surname of Manufacturer—"Adapted to distinguish"—User—Trade Marks Act*, 1905 (5 *Edw.* 7, *c.* 15), *s.* 9, *para.* 5; *s.* 44. *In re* H. G. BURFORD & Co.'S APPLICATION - C. A. 28

TRADE UNION—*Trade Dispute—Workmen and Workmen—Connected with Employment—All Workmen to join Local Union—Inducing Dismissal of Recalcitrants—Coercion on Employer—Injunction—Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 3; *s.* 5, *sub-s.* 3. VALENTINE *v.* HYDE Astbury J. 129

TRAFFIC—Extraordinary - - - 1
See HIGHWAY.

TRUST—Conversion - - - - 93
See WILL.

TRUSTEE—Annuity—Deduction of income tax - - - - - 364
See ANNUITY.

—— Marriage settlement - - - 161
See SETTLEMENT.

—— Remuneration - - - - 81
See COMPANY.

TRUSTEE ACT, 1888 - - - - 50
See LIMITATIONS, STATUTES OF.

UNDERTAKING — Damages — Interim injunction—Crown - - - **339**
See CROWN.

UNSOLD REAL ESTATE—Will - - **58**
See WILL.

USER—Trade mark - - - - **28**
See TRADE MARK.

VENDOR AND PURCHASER—*Parol Contract — Memorandum — Parties — Parcels—Parol Evidence—Statute of Frauds* (29 *Car.* 2, *c.* 3), *s.* 4. AUERBACH *v.* NELSON **Astbury J. 383**

2. ——*Residential Building Estate—Restrictive Covenants—Assignment of Benefit by Operation of Law—Right of Executors of Covenantee to sue.* IVES *v.* BROWN **Sargant J. 314**

WAR—Crown—Royal prerogative—Defence of the realm - - - **197**
See CROWN.

WILL—*Ambiguity—Bequest of Chattels "at" a House—"Furniture"—"Articles of virtu and curiosities"—Rare Books and Manuscripts—Plate deposited with Bankers for safe Custody. In re* BARONESS ZOUCHE. DUGDALE *v.* BARONESS ZOUCHE **P. O. Lawrence J. 178**

2. ——*Appropriation in Specie—Real and Personal Estate—Trust for Sale—Power to postpone—Investment Clause—Unsold Real Estate—Settled Shares of Residue—Construction. In re* WRAGG. WRAGG *v.* PALMER **P. O. Lawrence J. 58**

3. ——*Class—Gift to such Persons as on failure of preceding Trusts shall be "my next of kin and entitled to my personal estate under the statutes of distribution"—Time for ascertaining Class. In re* HUTCHINSON. CARTER *v.* HUTCHINSON - - - - **C. A. 17**

—— Company - - - - - **129**
See COMPANY.

4. ——*Condition Precedent — Bequest to Legatee on Acquisition of Baronetcy—Public Policy— Alternative independent Gift to Treasury. In re* WALLACE. CHAMPION *v.* WALLACE - - - - **Eve J. 305**

—— Estate tail - - - - **294**
See ESTATE TAIL.

5. ——*Option—House—Residence for Life on Conditions—Forfeiture—Powers of Tenant for Life—Construction—Settled Land Act,* 1882 (45 *&* 46 *Vict. c.* 38), *s.* 51. *In re* GIBBONS. GIBBONS *v.* GIBBONS **Eve J. 99**

WILL—*continued.*

6. ——*Residuary Gift—Trust for Conversion—Sale of Testator's Business prior to Death—Payment by Instalments—Partnership—Profits—Apportionment—Tenant for Life and Remainderman—Capital or Income—Mode of Calculation. In re* HOLLEBONE. HOLLEBONE *v.* HOLLEBONE - **Eve J. 93**

7. ——*Specific Legacy—Ademption—Order in Lunacy—Mistake—Patient's Banking Account—Appropriation of Payments—Rule in Clayton's Case—Lunacy Act,* 1890 (53 *&* 54 *Vict. c.* 5), *s.* 123. *In re* HODGSON'S TRUSTS. PUBLIC TRUSTEE *v.* MILNE **Peterson J. 189**

WINDING UP—Company - - - **155**
See COMPANY.

WORD—Distinctive—Trade mark - **28**
See TRADE MARK.

WORDS—"Adapted to distinguish": *In re* H. G. BURFORD & CO.'S APPLICATION - - - - **C. A. 28**

—— "Articles of virtu and curiosities": *In re* BARONESS ZOUCHE - **178**

—— "At" a house (chattels): *In re* BARONESS ZOUCHE - - **178**

—— "Extraordinary traffic": WESTON-SUPER-MARE U. D. C. *v.* BUTT (HENRY) & CO. - - **C. A. 1**

—— "Furniture": *In re* BARONESS ZOUCHE - - - **178**

—— "Long lease not at rack rent": *In re* S. K. SAWYER AND WITHALL **333**

—— "My people": *In re* KEIGHLEY. KEIGHLEY *v.* KEIGHLEY - **388**

—— "Net profits": PATENT CASTINGS SYNDICATE, LD. *v.* ETHERINGTON **C. A. 254**

—— "Rack rent": *In re* C. R. SAWYER AND WITHALL - - - **333**

WORKMEN—Trade union—Trade dispute
See TRADE UNION. **129**

WRITING—Absolute assignment in - **104**
See GIFT.

YEAR—To year—Tenancy from - **343**
See LANDLORD AND TENANT.

BIBL. LONDIN UNIV.

PRINTED BY W. SPEAIGHT AND SONS, LTD., 98–99, FETTER LANE, LONDON, E.C. 4.

THE

LAW REPORTS.

Under the Superintendence and Control of the

CORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES

CHANCERY DIVISION.

1919.—VOL. II. Ch.

(p. 1 to p. 67).

PART VII.—JULY 2.

TABLE OF CASES.

CHANCERY DIVISION.

	PAGE
BURFORD & Co.'s APPLICATION. C.A. (SWINFEN EADY M.R., SCRUTTON L.J., and EVE J.)	28
CARTER *v.* HUTCHINSON. *In re* HUTCHINSON. C.A. (SWINFEN EADY M.R., SCRUTTON L.J., and EVE J.)	17
HUTCHINSON, *In re*. CARTER *v.* HUTCHINSON. C.A. (SWINFEN EADY M.R., SCRUTTON L.J., and EVE J.)	17
POLE *v.* PATTENDEN. *In re* RICHARDSON .. .. .. PETERSON J.	50
RICHARDSON, *In re*. POLE *v.* PATTENDEN .. .. PETERSON J.	50
WESTON-SUPER-MARE URBAN COUNCIL *v.* HENRY BUTT & Co. C.A. (SWINFEN EADY M.R., WARRINGTON and SCRUTTON L.JJ.)	1
WRAGG, *In re*. WRAGG *v.* PALMER P. O. LAWRENCE J.	58

FOR MODE OF CITATION, SEE BEGINNING OF INDEX.

[*For Names of Editors and Reporters see Inside.*]

PUBLISHED BY THE COUNCIL AT ITS OFFICE, 30, MONTAGUE STREET, LONDON, W.C. 1,

AND

PRINTED BY W. SPEAIGHT & SONS, LTD., 98-99, FETTER LANE, LONDON, E.C. 4

"The Law Reports, 1919," for July consist of—

Chancery Division	Part VII.
King's Bench and Probate Divisions	Part VII.
Appeal Cases	Part III.
Chancery Division, Vol. I.	Index.
King's Bench Division, Vol. I.	Index.
Statutes	Part I.

Editor—Rt. Hon. Sir FREDERICK POLLOCK, Bart., *Barrister-at-Law.*

Assistant Editor of Current Digest—J. R. V. MARCHANT, *Barrister-at-Law*

Reporters:

House of Lords	H. B. Hemming,	*Barrister-at-Law.*
Privy Council	A. M. Talbot,	*Barrister-at-Law.*
Court of Appeal, No. 1	G. A. Streeten, W. Ivimey Cook,	*Barristers-at-Law.*
Court of Appeal, No. 2	W. F. Barry, W. H. Griffith,	*Barristers-at-Law.*
Mr. Justice Eve AND Mr. Justice Peterson	George Macan, R. Morrison,	*Barristers-at-Law.*
Mr. Justice Sargant AND Mr. Justice Younger	Frank Evans, Arthur Lawrence,	*Barristers-at-Law.*
Mr. Justice Astbury AND Mr. Justice P. O. Lawrence	G. R. Alston, H. L. Fraser,	*Barristers-at-Law.*
	A. Cordery,	*Barrister-at-Law.*
King's Bench Court of Criminal Appeal Appeals from County Courts in Bankruptcy Cases, and Railway and Canal Commission Cases.	J. F. Clerk, F. O. Robinson, J. E. Aldous, J. S. Henderson, R. F. Stubbing, J. Ritchie,	*Barristers-at-Law.*
Bankruptcy Cases	J. E. Aldous,	*Barrister-at-Law.*
Probate and Divorce	J. R. Brooke,	*Barrister-at-Law.*
Admiralty Cases	E. C. Trehern,	*Barrister-at-Law.*
Ecclesiastical Cases	C. F. Jemmett,	*Barrister-at-Law.*

THE INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

BINDING.

The Council will be pleased to receive from subscribers

(1919) CHANCERY, VOL. I. & (1919) K.B. VOL. I. and any unbound volumes of previous years' Law Reports

TO BIND DURING THE VACATION.

Upon request being made to the Secretary, unbound volumes will be collected within a radius of one and a half miles from the Law Courts.

Application should be made to the Secretary for an estimate of the cost of Binding any of the Council's publications in any style desired by a subscriber.

The back years of the *Law Reports*, since 1890, and of the *Indian Appeals*, since 1874, may be obtained on application to the Secretary. The *Weekly Notes* for 1891—1914 are out of print.

Prices for Office Pattern Bindings.

LAW REPORTS, 1919 (7 Vols.). ALSO C.C. DIGEST (1 Vol.),	Per Volume. s.	d.
CLOTH	5	0
HALF-CALF	8	6
HALF MOROCCO	9	6
CALF	11	6

WEEKLY NOTES, 1919 (1 Vol.).

	Notes of Cases. s.	d.	Notes of Cases and Miscellaneous. s.	d.
CLOTH	5	6	6	0
HALF-CALF	9	6	10	0
HALF MOROCCO	10	6	11	0
CALF	13	0	14	0

Office—30, Montague Street, London, W.C. 1.

ONLY ONCE IN A LIFE-TIME IS THERE A CHANCE

TO "BEGIN AT THE BEGINNING" OF

THE ENGLISH AND EMPIRE DIGEST,

Planned and designed to be the best and greatest Legal Work in the World.

It is being produced largely by the great Editorial Staff which produced HALSBURY'S LAWS OF ENGLAND with such world-wide success, and which is being sold now at £100 per set.

It is the first and only work of its kind.

It is a judicially interpreted DIGEST; that gives, not only a report of the Case in miniature, but also sets out what the Courts have said concerning the Case in subsequent decisions.

It eliminates the danger of relying on Cases which are no longer Law.

It aims at completeness—much new law has been brought to light—"that one Case overlooked may be disastrous."

It started on the publication of the first Volume with a great subscription list—which is being daily added to by the Profession.

"In the hurry and bustle of modern practice many relevant authorities are missed through want of a complete Digest."—*The Times*.

LET THE SET GROW WITH THE PRACTICE, AND THE PRACTICE EXTEND WITH THE SET.

For full Prospectus apply to

BUTTERWORTH & Co.(S. S. BOND), Bell Yard, Temple Bar, W.C.2.